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No. _____

In the Supreme Court of the United States

STATE OF TEXAS,
Petitioner,
v.
RAYMOND LEVI COBB,
Respondent.

On Petition for Writ of Certiorari to the Court of Criminal Appeals of Texas

PETITION FOR WRIT OF CERTIORARI

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This is a capital case.

QUESTIONS PRESENTED

I.

May an accused make an effective unilateral waiver of his Sixth Amendment right to counsel under *Michigan v. Jackson*, 475 U.S. 625 (1986), and *Patterson v. Illinois*, 487 U.S. 285 (1988), when his only previous "assertion" of that right to counsel consisted of accepting appointment of counsel following indictment on a different, but related, crime nearly a year and a half earlier?

II.

When an accused has been indicted for burglary, does his Sixth Amendment right to counsel attach, under *Maine v. Moulton*, 474 U.S. 159 (1985), and *McNeil v. Wisconsin*, 501 U.S. 171 (1991), to questioning about a factually related murder when the eventual capital murder conviction is not based on the previously charged burglary as a predicate felony?

III.

If the Court decides in *Dickerson v. United States*, No. 99-5525, that *Miranda* is not constitutionally mandated, could *Jackson*—which grafted *Miranda* and *Edwards v. Arizona*, 451 U.S. 477 (1984), into the Sixth Amendment context—constitutionally require the result in this case?

TABLE OF CONTENTS

Questions Presented i

Table of Contents ii

Index of Authorities iv

Citation of Court of Criminal Appeals's Opinion 1

Basis for Jurisdiction 1

Constitutional Provision Involved 1

Statement of the Case 2

Summary of Argument 8

Argument 9

I. The Court of Criminal Appeals's Decision Implicates an Important and Unsettled Question Regarding the Application of *Michigan v. Jackson* and *Patterson v. Illinois*. 9

A. *Jackson* and Its Progeny Do Not Support the Court of Criminal Appeals's Decision in this Case. 9

B. The Lower Courts Are Split on the Proper Interpretation of *Jackson*. 14

C. *Dickerson* May Provide an Additional Reason to Grant the Petition. 21

II. The Court of Criminal Appeals's Decision Implicates an Important and Unsettled Question Regarding the Attachment of the Sixth Amendment Right to Counsel to Factually Related Offenses. 21

Conclusion 30

APPENDIX

A. *Raymond Levi Cobb v. State*, No. 72,807, 2000 WL 275644 (Tex. Crim. App. Mar. 15, 2000) A-1

B. Excerpts from Suppression Hearing Testimony of Hal R. Ridley B-1

C. Excerpt from Trial Proceedings (Indictment) C-1

D. Findings of Fact and Conclusions of Law D-1

E. Charge of the Court on Guilt-Innocence E-1

F. Judgment and Sentence F-1

INDEX OF AUTHORITIES

Cases

Bradford v. State, 927 S.W.2d 329 (Ark. 1996) 9, 15

Brewer v. Williams, 430 U.S. 387 (1977) 7, 10, 11, 23

Commonwealth v. Rainwater, 425 Mass. 540, 681 N.E.2d 1218 (1997) 23

Dew v. United States, 558 A.2d 1112 (D.C. 1989) 9, 15, 16

Edwards v. Arizona, 451 U.S. 477 (1984) ..... ii, 9, 21

Garcia v. State, 571 S.W.2d 896 (Tex. Crim. App. 1978) ... 28

Genry v. State, 735 So.2d 186 (Miss. 1999) 9, 18

Holloway v. State, 691 S.W.2d 608 (Tex. Crim. App. 1984) ..16

Holloway v. State, 780 S.W.2d 787 (Tex. Crim. App. 1989) 9, 15, 16

In re Pack, 420 Pa. Super. 347, 616 A.2d 1006 (1992) 23, 26, 28

Johnson v. Zerbst, 304 U.S. 458 (1938) 11

Kirby v. Illinois, 406 U.S. 682 (1972) 10

Maine v. Moulton, 474 U.S. 159 (1985) ..... *passim*

Massiah v. United States, 377 U.S. 201 (1964) 10

McNeil v. Wisconsin, 501 U.S. 171 (1991) ..... *passim*

Michigan v. Harvey, 494 U.S. 344 (1990) 11, 13, 14, 18

Michigan v. Jackson, 475 U.S. 625 (1986) ..... *passim*

Miranda v. Arizona, 384 U.S. 436 (1966) 21

Montoya v. Collins, 955 F.2d 279 (CA5 1992) 9, 17

Moran v. Burbine, 475 U.S. 412 (1986) 11

Patterson v. Illinois, 487 U.S. 285 (1988) ..... *passim*

People v. Anderson, 521 N.W.2d 538 (Mich. 1994) 9, 18

People v. Clankie, 530 N.E.2d 448 (Ill. 1988) 23, 25

Raymond Levi Cobb v. State, No. 72,807, 2000 WL 275644 (Tex. Crim. App. Mar. 15, 2000) ..... *passim*

Skaggs v. Parker, 27 F.Supp.2d 952 (W.D. Ky. 1998) 9, 18

Smith v. State, 699 So.2d 629 (Fla. 1997) 9, 18

State v. Carter, 664 So.2d 367 (La. 1995) 9, 17, 18

State v. Frye, 897 S.W.2d 324 (Tex. Crim. App. 1995) 21

United States v. Arnold, 106 F.3d 37 (CA3 1997) 21, 23, 29

United States v. Cooper, 949 F.2d 737 (CA5 1991) 23, 27

United States v. Covarrubias, 179 F.3d 1219 (CA9 1999) 23, 24, 26, 28

United States v. Dickerson, 166 F.3d 667 (CA4), *cert. granted*, 120 S.Ct. 578 (1999) (No. 99-5525) ..... ii, 20, 21

United States v. Doherty, 126 F.3d 769 (CA6 1997) 23, 24

United States v. Gouveia, 467 U.S. 180 (1984) 10

United States v. Hines, 963 F.2d 255 (CA9 1992) 24

United States v. Kidd, 12 F.3d 30 (CA4 1993) 25

United States v. Martinez, 972 F.2d 1100 (CA9 1992) 24

United States v. Melgar, 139 F.3d 1005 (CA4 1998) 23, 25, 26, 28

United States v. Mitcheltree, 940 F.2d 1329 (CA10 1991) ... 24

United States v. Wade, 388 U.S. 218 (1967) 10

United States v. Williams, 993 F.2d 451 (CA5 1993) 23

Upton v. State, 853 S.W.2d 548 (Tex. Crim. App. 1993) 21, 29

West v. Johnson, 92 F.3d 1385 (CA5 1996) 18

Whittlesey v. State, 665 A.2d 223 (Md. 1995) 24-26

Wilcher v. Hargett, 978 F.2d 872 (CA5 1992) 18

Statutes and Rules

SUP. CT. R. 10(b), (c). 8

TEX. PENAL CODE §30.02(a)(1) 28

Constitutional Provisions–

U.S. CONST. amend VI. 1

Other Authorities

Meredith B. Halama, *Loss of a Fundamental Right: The Sixth Amendment as a Mere "Prophylactic Rule,"* 1998 U. Ill. L. Rev. 1207 (1998) 18

WAYNE R. LAFAVE, JEROLD H. ISRAEL, & NANCY J. KING, CRIMINAL PROCEDURE (2d ed. 1999) 15, 18, 24

PETITION FOR WRIT OF CERTIORARI

The Texas Court of Criminal Appeals erroneously held that Respondent Raymond Cobb's voluntary confession was taken in violation of the Sixth Amendment right to counsel and reversed his capital murder conviction. The court's decision places it on one side of an irreconcilable conflict among numerous state and federal decisions regarding the ability of represented defendants to waive their Sixth Amendment right to counsel. The decision also wrongly applies an exception to this Court's Sixth Amendment jurisprudence that has been developed in the lower courts but never adopted by the Court. The Court should grant this petition to resolve these important, unsettled questions of federal constitutional law.

CITATION OF COURT OF CRIMINAL APPEALS'S OPINION

Raymond Levi Cobb v. State, No. 72,807, 2000 WL 275644 (Tex. Crim. App. Mar. 15, 2000).

BASIS FOR JURISDICTION

The Texas Court of Criminal Appeals delivered its judgment and opinion in *Cobb* on March 15, 2000. This Court has jurisdiction to entertain the State's petition for writ of certiorari under 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISION INVOLVED

> "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

U.S. CONST. amend VI.

STATEMENT OF THE CASE

Early in the morning of Monday, December 27, 1993, two days after Christmas, Lindsey Owings kissed his sleeping wife, Maggie, and his sleeping sixteen-month-old daughter, Kori Rae, goodbye and left for work. He never saw them again.

The day before, the Owings had met their neighbor, Raymond Cobb, who was living across the street with his sister and her boyfriend, when he knocked on their door looking for his dog. In the late morning or early afternoon of December 27, Cobb burglarized the Owings' home, stealing a VCR, a stereo, some Walt Disney videotapes, and a bottle of tequila. In the course of that burglary, Cobb stabbed Maggie to death and buried her and Kori Rae in a wooded area about a mile from the house. Kori Rae was alive when Cobb buried her, and she died soon after of suffocation.

Lindsey arrived home after work and found his wife and child missing. Aside from the few missing items, there were no signs of a struggle or foul play. He reported the burglary and the disappearances to the Walker County police. The police searched the surrounding area, canvassed the neighbors, and published fliers with photos of Maggie and Kori Rae, but no trace of them was found.

In February 1994 an anonymous tip led police to suspect Cobb in the burglary. Cobb initially denied involvement, but eventually admitted to Walker County detectives that he had burglarized the Owings' home on December 27, 1993. Cobb made a voluntary, written statement to that effect in July 1994, but steadfastly denied any involvement in the disappearances.

Based on his statement, Cobb was indicted for burglary of the Owings' home. In August 1994, an attorney, Hal Ridley, was

appointed to represent Cobb. App., at B-2.[1] Ridley's representation of Cobb was limited to the pending burglary charge. *Id.* Based on a conversation with Walker County District Attorney David Weeks, Ridley understood that Cobb was not yet a suspect in the disappearances, but that the police believed Cobb knew more than he was saying. App., at B-3. This was important to Ridley, because Ridley had recently been involved in a capital murder trial and "really didn't want to get involved in another one right behind that, if Mr. Cobb was in fact a suspect." *Id.*

Over the next fourteen months, the Walker County detectives continued to investigate the disappearances of Maggie and Kori Rae. On two occasions, the detectives asked Ridley for permission to question Cobb about the disappearances. The first of these occasions was at Cobb's arraignment for burglary, shortly after Ridley was appointed. App., at B-5. When asked for permission to talk to Cobb, Ridley stated, "I gave my permission and told them that it wasn't necessary for me to be there." *Id.* The second occasion was in September 1995; Ridley again gave his permission for Cobb to be interrogated about the disappearances outside Ridley's presence. *Id.*, at B-5 to B-6.[2]

By November 1995 Cobb was out on bond on the burglary charge and had moved back to Odessa, Texas, where Cobb's father, Charles, lived. On November 11, 1995, Charles Cobb telephoned Walker County detective Judy James, the lead investigator on the case, and told her that Raymond had confessed to killing Maggie and Kori Rae during the burglary. James advised Charles to make

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1. A transcript of Ridley's suppression hearing testimony appears in the Appendix to this petition (App. B).

2. In fact, on this occasion, Cobb led investigators through a wooded area near the Owings' residence, retracing his steps during the burglary. A subsequent search of the area with cadaver dogs uncovered no evidence, however.

a statement to the Odessa police, and he did. The Odessa police faxed Charles's statement to James and she used it to obtain an arrest warrant for Raymond Cobb, which she then faxed back to Odessa. James did not inform the Odessa police that Cobb was represented by an attorney on the burglary charge.

By this time, Odessa detectives Vic Sikes and Harold Thomas had already ascertained Cobb's whereabouts—he was at a hospital with his girlfriend, Kandy, who was pregnant with Cobb's son and was experiencing labor pains. Around 2 a.m. on the morning of November 12, the detectives identified Cobb and Kandy as they emerged from the hospital (the labor had been false). They arrested Cobb, Mirandized him, and brought him to the police station. They telephoned James and informed her that they had Cobb in custody. When they asked her if they could question him, James agreed.

Detectives Sikes and Thomas brought Cobb to an interview room and Mirandized him again. Beginning around 3 a.m., Sikes questioned Cobb for approximately an hour, without success. After a five-minute break, Thomas took over the interrogation. Ascertaining that Cobb was a churchgoer, Thomas spoke to Cobb about his faith. This approach worked, and Cobb soon confessed to the murders. Both orally and thereafter in writing, Cobb explained that on December 27, 1993, he had entered the Owings' home and begun removing the stereo. Maggie Owings confronted him, and Cobb stabbed her in the stomach with a double-edged knife he was carrying. Cobb carried and dragged Maggie's body to a wooded area several hundred yards from the house. He then stated:

> "I went back to her house and I saw the baby laying in its bed. I took the baby out there and it was sleeping the whole time. I laid the baby on the ground four or five feet away from its mother. I went back to my house and got a flat edge shovel. That's all I could find. Then I went back over to where they were and started digging a hole between

> them. After I got the hole dug the baby was awake. It started going toward its mom and it fell in the hole. I put the lady in the hole and I covered them up. I remember stabbing a different knife I had in the ground where they were. I was crying right then."

Afterwards, Cobb returned to the Owings' house and completed his theft of the stereo, VCR, videotapes, and the bottle of tequila. Cobb stated that he had been drinking beer and tequila and smoking marijuana that day and "had a pretty good buzz."

Cobb confessed just after 5 a.m. on the morning of November 12, 1995. He said that he thought he still had the murder weapon and consented to a search of his home in Odessa, accompanying Sikes and Thomas there around 6 a.m. Cobb was unable to find the knife, but he did retrieve a gold ring that he gave to the officers, saying, "This is the wedding band that I took off Margaret Owings when I killed her."

Around 9 a.m., Cobb was arraigned on capital murder charges in Odessa. Cobb was then flown, with Thomas and Sikes, to Walker County, where they were met by Walker County investigators and a justice of the peace. Cobb was arraigned again at the airport and then taken to the Owings' residence. He then led the police from the house to the wooded area where he had buried Maggie and Kori Rae. As crime technicians began to secure the grave, Cobb was taken to jail and booked. Not once, from the time Cobb was arrested through the time he showed police the burial site, did Cobb ever indicate that he wanted to speak to an attorney or that he was represented by an attorney on the burglary charge.

That evening, just near dark, the crime technicians found at the grave site clothing and bone fragments later determined to belong to Maggie Owings. They found Kori Rae's clothing, but no sign of her body. Later that evening, Walker Court District Attorney

Weeks telephoned Hal Ridley, Cobb's attorney on the burglary charge, and told him what had transpired.

Ridley met with Cobb in jail the next day, November 13, 1995. While there, Ridley talked with the Walker County investigators; regarding that conversation, Ridley testified:

> "In fact [Walker County detective] Judy [James] asked me if I was going to be representing him. I told her I didn't know. I was his lawyer for the burglary case; that, you know, that decision hadn't been made to my knowledge yet, but we talked a little bit." App., at B-10.

Either that evening or the following evening, investigators contacted Ridley and asked permission to bring Cobb back to the grave site.[3] The crime technicians had been unable to find any sign of Kori Rae's body and hoped that Cobb could provide assistance. Ridley agreed to let Cobb help, but Cobb was unable to lead the investigators to the child's remains.[4]

On the evening of the 14th, Ridley was summoned to jail to help Cobb cope with "emotional problems"—Cobb was apparently distressed because his son had been born that day. Ridley helped arrange a telephone call to Cobb's girlfriend, Kandy. App., at B-11.

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3. The suppression hearing testimony of Ridley and James seems inconsistent regarding the date that Cobb was brought back to the grave site after being booked. James testified that this occurred on the evening of November 13, but Ridley seemed to testify that it occurred on the evening of November 14 (App., at B-10). The inconsistency appears entirely inadvertent and, in any event, the date is irrelevant since it is undisputed that Ridley consented to the officers' request to bring Cobb back out to the grave.

4. Expert testimony during trial established the likelihood that Kori Rae's body was either entirely consumed by scavengers or that her immature bones simply disintegrated in the decomposition process.

Shortly after that, Ridley was appointed to represent Cobb on the murder charges:

> "A: . . . And ultimately, I was appointed to represent him, and after that I pretty much—well, after that I pretty much cut off the (sic) any more contact that he had with law enforcement.
>
> Q: To the best of your knowledge he has not had any further contact?
>
> A: Shouldn't have had after the 14th. If he did, it was without my permission." App., at B-11.

Before Cobb's capital murder trial began, the defense moved to suppress Cobb's confession as having been obtained in violation of, *inter alia*, the Sixth Amendment. After a hearing, the trial court denied the motion to suppress. *See* App. D. The jury found Cobb guilty of capital murder and Cobb was assessed the death penalty. *See* App., at E-12; App. F.

In a 6-3 decision, the Texas Court of Criminal Appeals reversed Cobb's conviction and remanded for a new trial. *See Cobb v. State*, No. 72,807, 2000 WL 275644 (Tex. Crim. App. Mar. 15, 2000) (en banc) (App. A). The court found that Cobb's Sixth Amendment right to counsel, which had attached when Cobb was indicted for burglary, also attached to the murder investigation, because the two offenses were "factually interwoven." App., at A-7. The court also determined that Cobb had "asserted" his Sixth Amendment right to counsel "by accepting Ridley's appointment as his counsel." *Id.* These facts, the court reasoned, implicated the prophylactic rule of *Michigan v. Jackson*, 475 U.S. 625 (1986), and rendered presumptively involuntary Cobb's unilateral waiver of his right to counsel during the November 12, 1995 interrogation. A vigorous dissent from Judges McCormick, Keller, and Keasler would have found that: (1) *Michigan v. Jackson* did not apply to these facts and that Cobb had validly waived his Sixth Amendment right to counsel

under *Brewer v. Williams*, 430 U.S. 387 (1977), and made a voluntary confession, and (2) in any event, under *McNeil v. Wisconsin*, 501 U.S. 171 (1991), Cobb's Sixth Amendment right to counsel had not attached with regard to the capital murder offense at the time he confessed. App., at A-25 & n.20.

SUMMARY OF ARGUMENT

In suppressing Cobb's confession to the murders, the Court of Criminal Appeals committed two errors, each implicating an important and unsettled question of Sixth Amendment law on which numerous state and federal courts disagree. First, the court misconstrued this Court's decisions in *Michigan v. Jackson, supra,* and *Patterson v. Illinois*, 487 U.S. 285 (1988), by ruling that Cobb's mere acceptance of appointed counsel qualified as an "assertion" of his right to counsel. Second, by ruling that Cobb's right to counsel had attached to the as-yet-uncharged murder offenses, the court both violated this Court's offense specific rule in *McNeil v. Wisconsin, supra,* and also misapplied the "inextricably intertwined" exception to that rule that has developed in the state and federal courts, but has never been adopted by the Court.

The court's erroneous decision in *Cobb* implicates two aspects of this Court's certiorari jurisdiction. The decision conflicts with decisions of other state courts of last resort and one United States court of appeals; it also decides an important question of federal constitutional law that has not been, but should be, settled by this Court. *See* SUP. CT. R. 10(b), (c).

ARGUMENT

I. THE COURT OF CRIMINAL APPEALS'S DECISION IMPLICATES AN IMPORTANT AND UNSETTLED QUESTION REGARDING THE APPLICATION OF *MICHIGAN V. JACKSON* AND *PATTERSON V. ILLINOIS*.

The Court of Criminal Appeals reversed Cobb's conviction because it erroneously believed that his mere acceptance of appointed counsel in the burglary case barred Cobb's waiver of his right to counsel prior to his murder confession. In so holding, the court reiterated its expansive view of *Jackson* and placed itself irreconcilably in conflict with the majority of courts to decide the issue, which require some affirmative assertion of the right to counsel to invoke *Jackson*'s prophylactic rule. *Compare Raymond Levi Cobb v. State*, No. 72,807, 2000 WL 275644 (Tex. Crim. App. Mar. 15, 2000), *Bradford v. State*, 927 S.W.2d 329, 333-34 (Ark. 1996), *Dew v. United States*, 558 A.2d 1112, 1116 (D.C. 1989), *and Holloway v. State*, 780 S.W.2d 787, 795-96 (Tex. Crim. App. 1989), *with Montoya v. Collins*, 955 F.2d 279, 283 (CA5 1992), *Skaggs v. Parker*, 27 F.Supp.2d 952, 977 (W.D. Ky. 1998), *Genry v. State*, 735 So.2d 186, 195-96 (Miss. 1999), *Smith v. State*, 699 So.2d 629, 638-39 (Fla. 1997), *State v. Carter*, 664 So.2d 367, 370 (La. 1995), *and People v. Anderson*, 521 N.W.2d 538, 543-44 (Mich. 1994). The conflict is best understood in light of *Jackson* and the Court's subsequent Sixth Amendment jurisprudence.

A. *Jackson* and Its Progeny Do Not Support the Court of Criminal Appeals's Decision in this Case.

In *Michigan v. Jackson*, the Court held that "if police initiate interrogation after a defendant's assertion, at an arraignment or similar proceeding, of his right to counsel, any waiver of the defendant's right to counsel for that police-initiated interrogation is invalid." 474 U.S. 625, 636 (1986). The Court in *Jackson* imported into Sixth Amendment jurisprudence the "prophylactic"

rule of *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1984), which provides, in the Fifth Amendment context, that once an accused in custody expresses his desire to deal with police only through counsel, the accused is no longer subject to further police-initiated interrogation until he is provided with counsel. *See Jackson*, 474 U.S., at 626. In *Jackson*, two defendants had requested appointed counsel at arraignment, but before they consulted with counsel, the police initiated questioning, secured written waivers of their right to counsel, and obtained their confessions. *Id.*, at 627-28. Applying *Edwards*, the Court held that the written waivers were presumptively ineffective to waive the defendants' previously invoked Sixth Amendment right to counsel. *Id.*, at 635.

Long before *Jackson*, the Court delineated the pretrial contours of an accused's Sixth Amendment right to counsel. In *Kirby v. Illinois*, the Court held that the right attaches upon the "initiation of judicial criminal proceedings." 406 U.S. 682, 689 (1972). The right, however, only protects defendants at post-attachment proceedings deemed "critical stages." *See, e.g., United States v. Wade*, 388 U.S. 218, 224 (1967). Pretrial proceedings are critical when "the results might well settle the accused's fate and reduce the trial to a mere formality." *Id.; see also United States v. Gouveia*, 467 U.S. 180, 189 (1984). The Court has often recognized that police interrogation, occurring after attachment of the Sixth Amendment right to counsel, is a critical stage at which an accused is entitled to the assistance of counsel. *See, e.g., Jackson*, 475 U.S., at 629-30; *Brewer v. Williams*, 430 U.S. 387, 400-01 (1977); *Massiah v. United States*, 377 U.S. 201, 206 (1964).

Equally clear from the Court's Sixth Amendment cases is the general proposition that an accused may waive the benefits of his right to counsel, if he does so knowingly, intelligently, and voluntarily. In *Brewer v. Williams*, for example, the police elicited statements from a previously arraigned defendant during a long automobile trip; the defendant had already consulted with two

lawyers, and the police, knowing this, had agreed not to question him during the trip. 430 U.S., at 391-93. The Court concluded that the defendant had been denied the assistance of counsel during this post-attachment interrogation and that his mere responses to the officers' subtle questioning did not establish an "intentional relinquishment or abandonment" of his right to counsel. *Id.*, at 404-05 (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)). Although the Court did not find a waiver in *Brewer*, its opinion was founded on the bedrock proposition that a post-attachment waiver of the Sixth Amendment right to counsel is possible. *See, e.g., Brewer*, 430 U.S., at 403-04 (agreeing with lower courts about "the proper standard to be applied in determining the question of waiver"). The Court took pains to clarify the scope of its holding:

> "The Court of Appeals did not hold, nor do we, that under the circumstances Williams could not, without notice to counsel, have waived his rights under the Sixth and Fourteenth Amendments. It only held, as do we, that he did not." *Id.*, at 405-06 (footnote omitted).

This real possibility of post-attachment waiver has been consistently reaffirmed by the Court.[5]

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5. *See, e.g., Moran v. Burbine*, 475 U.S. 412, 428 (1986) ("It is clear that, absent a valid waiver, the defendant has the right to the presence of an attorney during [post-attachment interrogation]."); *Jackson*, 475 U.S., at 630 (posing question as "whether respondents validly waived their right to counsel at the postarraignment custodial interrogations"); *Patterson v. Illinois*, 487 U.S. 285, 292 (1988) (addressing whether unrepresented defendant made a "'knowing and intelligent' waiver of his Sixth Amendment right" (citing *Brewer*, 430 U.S., at 401, 404)); *Michigan v. Harvey*, 494 U.S. 344, 352 (1990) ("[N]othing in the Sixth Amendment prevents a suspect charged with a crime and represented by counsel from voluntarily choosing, on his own, to speak with police in the absence of an attorney.").

Having developed the concepts of "attachment" and "waiver" in the Sixth Amendment context, the Court in *Jackson* introduced an additional strand—the effect of an accused's "assertion" of his right to counsel. As discussed above, *Jackson* grafted the *Edwards* prophylactic rule onto the Sixth Amendment, rendering presumptively invalid an accused's unilateral waiver of the right to counsel if the accused has already invoked that right. *Jackson*, 475 U.S., at 636. The unmistakable premise of *Jackson* is that mere attachment of the Sixth Amendment is not enough to trigger the *Edwards* rule; rather, the accused must make some positive "assertion" or "invocation" to enjoy the prophylactic benefits of *Edwards*. *See Jackson*, 475 U.S., at 626 (framing question as whether *Edwards* applies to a formally charged defendant "who has requested appointment of counsel at his arraignment"); *id.*, at 636 (holding unilateral waiver invalid "after a defendant's assertion, at an arraignment or similar proceeding, of [defendant's] right to counsel"); *id.*, at 635 (observing that written waivers cannot justify police-initiated interrogations "after the request for counsel in a Sixth Amendment analysis"); *id.*, at 631 (discussing "reasons for prohibiting the interrogation of an uncounseled prisoner who has asked for the help of a lawyer").

Although disagreeing with applying *Edwards* in the Sixth Amendment context, the dissenting Justices in *Jackson* carefully noted the limits of the majority's holding:

> "[T]he Court most assuredly does not hold that the *Edwards* per se rule prohibiting all police-initiated interrogations applies from the moment the defendant's Sixth Amendment right to counsel attaches, with or without a request for counsel by the defendant. Such a holding would represent, after all, a shockingly dramatic restructuring of the balance this Court has traditionally struck between the rights of the defendant and those of the larger society. Applying the *Edwards* rule to situations in which a defendant has not made an explicit request for counsel would also render completely nugatory the extensive discussion of "waiver" in such prior Sixth Amendment cases as *Brewer v. Williams*, 430 U.S. 387, 401-406, 97 S.Ct. 1232, 1241-1243, 51 L.Ed.2d 424 (1977)." *Jackson*, 475 U.S., at 640 (Rehnquist, J., dissenting, joined by Powell & O'Connor, JJ.).

The Court's subsequent Sixth Amendment cases have demonstrated that *Jackson* was not, as Justice Rehnquist admonished, the "shockingly dramatic restructuring" of the Court's prior waiver jurisprudence. In *Patterson v. Illinois*, for example, the Court held that *Jackson* did not apply to an accused's postindictment interviews with police, because the accused "at no time sought to exercise his right to have counsel present." 487 U.S. 285, 290 (1988). The Court observed that its holding in *Jackson* "turned on the fact that the accused 'ha[d] asked for the help of a lawyer' in dealing with police," and that the accused in *Patterson* could have put an end to questioning by "indicat[ing] that he wanted the assistance of counsel." *Id.*, at 291 (quoting *Jackson*, 475 U.S., at 631). Language in the Court's cases following *Patterson* has confirmed that view of *Jackson*.[6]

The Court's Sixth Amendment jurisprudence in this area is not seamless, however. *Patterson* dealt with a situation in which the right to counsel had attached, but the accused had not requested a lawyer and had not, in fact, consulted with a lawyer. In *Patterson*, the Court appended the following cryptic footnote to its discussion:

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6. *See, e.g., Harvey*, 494 U.S., at 352 (observing that *Jackson* changes the waiver analysis "once a defendant obtains, or even requests counsel"); *McNeil v. Wisconsin*, 501 U.S. 171, 179 (1991) (stating that *Jackson* applies "after the Sixth Amendment right to counsel attaches and is invoked").

> "We note as a matter of some significance that petitioner had not retained, or accepted by appointment, a lawyer to represent him at the time he was questioned by authorities. Once an accused has a lawyer, a distinct set of constitutional safeguards aimed at preserving the sanctity of the attorney client relationship takes effect. *See Maine v. Moulton*, 474 U.S. 159, 176, 106 S.Ct. 477, 487-88, 88 L.Ed.2d 481 (1985). . . . Indeed, the analysis changes markedly once an accused even requests the assistance of counsel. *See Michigan v. Jackson, supra*." *Patterson*, 487 U.S., at 290 n.3.

The Court did not make clear what "distinct set of constitutional safeguards" it was referring to. *Id.* The portion of *Moulton* the Court cited stands for the unremarkable proposition that the state violates the Sixth Amendment by obtaining incriminating statements from an accused through surreptitious, post-indictment interrogation by a police informant. *See Moulton*, 474 U.S., at 176. *Patterson*'s footnote three is particularly confusing in light of the Court's unequivocal statement two years later in *Michigan v. Harvey*, that "nothing in the Sixth Amendment prevents a suspect charged with a crime *and represented by counsel* from voluntarily choosing, on his own, to speak with police in the absence of an attorney." 494 U.S. 344, 352 (1990) (emphasis added).

B. The Lower Courts Are Split on the Proper Interpretation of *Jackson*.

That footnote three evidences an ambiguity in the Court's Sixth Amendment jurisprudence is clear from the widespread disagreement among state and federal courts about the proper application of *Jackson* and *Patterson*. Specifically, the courts disagree about whether an accused may unilaterally waive his Sixth Amendment right to counsel when he has been appointed counsel, and may in fact have consulted with counsel, but when he has made no "assertion" within the meaning of *Jackson* of his desire to deal

with the police only through counsel. There is a widespread and irreconcilable conflict in state and federal courts about this question of federal constitutional law, and the Court should grant this petition to resolve this important constitutional issue.

The leading cases holding that a represented defendant cannot unilaterally waive his right to counsel, even when he has not previously asserted that right, are *Dew v. United States*, 558 A.2d 1112 (D.C. 1989), and *Holloway v. State*, 780 S.W.2d 787, 795-96 (Tex. Crim. App. 1989). In *Dew*, the accused was indicted for robbery and was appointed counsel; when he failed to appear for arraignment, he was arrested and Mirandized, and he subsequently gave an incriminating statement. 558 A.2d, at 1114. Based on its reading of *Moulton* and footnote three in *Patterson*, the District of Columbia Court of Appeals held that "appointment of counsel" is equivalent to the "request for counsel" necessary to trigger *Jackson*. *Dew*, 558 A.2d, at 1116. In a footnote, the court observed that "[t]he record is clear that [the accused] did not affirmatively request counsel within the meaning of *Michigan v. Jackson*." *Id.* (citations omitted). *See generally* 2 WAYNE R. LAFAVE, JEROLD H. ISRAEL, & NANCY J. KING, CRIMINAL PROCEDURE ("LAFAVE") §6.4(f), at 495 & n.110, 497 & n.123 (2d ed. 1999).[7]

In *Holloway*, the Texas Court of Criminal Appeals reached the same result as *Dew*, albeit through somewhat different reasoning. The defendant in *Holloway* was indicted for capital murder and an attorney was appointed to represent him. 780 S.W.2d, at 788-89.

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7. The Arkansas Supreme Court followed *Dew*'s reasoning in *Bradford v. State*, 927 S.W.2d 329, 333-34 (Ark. 1996). In *Bradford*, the court held that appointment of counsel was equivalent to a request for counsel under *Jackson*, even though neither the accused nor the interrogating police were aware of the appointment. *Id.* It is passing strange that a defendant who is unaware that counsel has been appointed can to be said have "invoked" his right to counsel under *Jackson*.

The attorney first attempted, unsuccessfully, to refuse the appointment, but soon after met with the defendant and advised him not to submit to questioning. *Id.*, at 789. When police later initiated questioning, the defendant waived his right to counsel and gave incriminating statements. *Id.* The Court of Criminal Appeals initially held that police had not violated the defendant's Sixth Amendment right to counsel,[8] but this Court vacated and remanded for consideration in light of *Jackson* and *Moran v. Burbine*, 475 U.S. 412 (1986). *Holloway*, 780 S.W.2d, at 788.

On remand, the Court of Criminal Appeals reversed itself and found that the defendant's Sixth Amendment rights had been violated. *Id.*, at 789. Surprisingly, the first part of the court's analysis concluded that, because the defendant never requested counsel, *Jackson* did not apply. *Id.*, at 789-90 ("*Jackson*'s ban on police-initiated interrogation . . . was based not on the mere existence of the right to counsel but upon the accused's actual invocation of that right."). Nevertheless, the court reasoned in the second part of its analysis that, because the defendant was in fact represented by counsel and had developed a "relationship" with counsel, the defendant could not thereafter unilaterally waive his right to counsel. *Id.*, at 795. The court relied heavily on *Patterson*'s footnote three and interpreted *Patterson*'s "distinct set of constitutional safeguards" as prohibiting unilateral waiver when an accused has consulted with an attorney, despite the fact that the defendant had never "asserted" his right to counsel under *Jackson*. *See id.*, at 791, 794. Functionally, then, *Holloway* mirrors the conclusion of the *Dew* court that appointment of counsel equals a "request for counsel" under *Jackson*, *see Dew*, 558 A.2d, at 1116, as the Court of Criminal Appeals made clear in this case.

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8. *See Holloway v. State*, 691 S.W.2d 608, 614-15 (Tex. Crim. App. 1984).

The leading cases in conflict with *Dew* and *Holloway* are *Montoya v. Collins*, 955 F.2d 279 (CA5 1992), and *State v. Carter*, 664 So.2d 367 (La. 1995). These cases, and those that follow them, stand for the proposition that an accused whose Sixth Amendment rights have attached and who has been appointed counsel must nevertheless make "an actual, positive statement or affirmation of the right to counsel" in order to enjoy the prophylactic benefits of *Jackson* and its progeny. *Montoya*, 955 F.2d, at 282. *Montoya* and *Carter* stand in direct, irreconcilable conflict with the rule set forth in *Dew* and *Holloway* that an accused who has been appointed counsel cannot unilaterally waive his right to counsel, regardless of whether he has expressly invoked the right.

In *Montoya*, the defendant did not request appointed counsel when arraigned on capital murder charges. 955 F.2d, at 282. Because of the nature of the charges, however, the magistrate appointed counsel to represent the defendant. *Id.*, at 282-83. When the police subsequently initiated questioning, the defendant waived his rights and confessed. *Id.*, at 282. The Fifth Circuit held that defendant's waiver was not presumptively invalid, because he had not effectively asserted his right to counsel under *Jackson*:

> "For purposes of *Jackson*, an 'assertion' means some kind of positive statement or other action that informs a reasonable person of the defendant's 'desire to deal with the police only through counsel.'" *Id.*, at 283 (quoting *Jackson*, 475 U.S., at 626).

Significantly, the court explained that the oft-cited language in footnote three of *Patterson* refers only to the attachment of the substantive Sixth Amendment safeguards surrounding the attorney-client relationship, and *not* to the question of what constitutes an acceptance or invocation of the right to counsel. *Montoya*, 955 F.2d, at 283 (construing *Patterson*, 487 U.S., at 290 n.3). *Patterson*, explained the court, reaffirmed that "*Jackson* applies when a defendant has indicated he wanted the assistance of

counsel." *Montoya*, 955 F.2d, at 283 (quotations omitted). *See generally* LAFAVE, §6.4(f), at 497 & n.123.[9]

In *State v. Carter*, the Louisiana Supreme Court followed *Montoya* and held that a defendant who had not asserted or invoked his right to counsel could validly waive that right, even though he had already been appointed counsel at his initial appearance. 664 So.2d, at 370. After an exhaustive survey of this Court's Sixth Amendment cases, *Carter* concluded that "the Supreme Court has not erected a per se barrier against the validity of waivers made in response to interrogation, *even where a defendant is represented by counsel*." *Id.*, at 377 (emphasis added) (citing *Harvey*, 494 U.S., at 352-53). Examining *Jackson* and *Patterson* in light of *Brewer*, the court also found that "the mere fact of appointment of counsel" does not alone preclude subsequent interrogation. *Carter*, 664 So.2d, at 380.[10] The court explicitly disagreed with the decisions in *Dew* and *Holloway*. *Id.*, at 380 n.12.[11]

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9. The Fifth Circuit has applied *Montoya* to the situation where an indicted defendant waived his right to counsel and made incriminating statements, even though unaware that counsel had been appointed to represent him. *Wilcher v. Hargett*, 978 F.2d 872, 874, 876 (CA5 1992); *see also West v. Johnson*, 92 F.3d 1385, 1403-04 (CA5 1996) (following *Montoya*).

10. Other state supreme courts have followed this reading of *Jackson* and *Patterson*. *See Genry v. State*, 735 So.2d 186, 195-96 (Miss. 1999); *Smith v. State*, 699 So.2d 629, 638-39 (Fla. 1997); *People v. Anderson*, 521 N.W.2d 538, 543-44 (Mich. 1994). The District Court for the Western District of Kentucky has adopted *Montoya*'s reasoning. *See Skaggs v. Parker*, 27 F.Supp.2d 952, 977 (W.D. Ky. 1998).

11. *See generally* Meredith B. Halama, *Loss of a Fundamental Right: The Sixth Amendment as a Mere "Prophylactic Rule,"* 1998 U. Ill. L. Rev. 1207, 1230-37 (1998) (noting conflict among *Montoya*, *Carter*, *Dew*, and *Holloway*).

This Court has observed that "the ready ability to obtain uncoerced confessions is not an evil but an unmitigated good." *McNeil v. Wisconsin*, 501 U.S. 171, 181 (1991). But the disagreement among state and federal courts regarding the application of this Court's Sixth Amendment jurisprudence weakens the likelihood of law enforcement realizing this "unmitigated good." As exemplified by *Dew* and *Holloway* on one side, and *Montoya* and *Carter* on the other, courts fundamentally disagree about the scope of the *Jackson* prophylactic rule. The consequences of this disagreement are critical: an overly expansive application of *Jackson* will result in the unwarranted suppression of voluntary confessions that are perfectly valid under *Brewer*. This Court has established that *Jackson* applies only when an accused has affirmatively demonstrated that he desires the buffer of counsel between himself and the criminal judicial mechanism of the state. Applying *Jackson* outside that context—when its protections are not actively sought—will contribute nothing towards "[p]reserving the integrity of an accused's choice to communicate with police only through counsel." *Patterson*, 487 U.S., at 291.

The Texas Court of Criminal Appeals's erroneous decision to suppress Cobb's uncoerced confession in the case at bar conflicts with *Jackson*, *Patterson*, *Montoya*, and *Carter*, and perfectly demonstrates the unjustified costs of misapplying *Jackson*. With no citation to authority, the court simply ruled that "once [Cobb's] right to counsel attached, he asserted it by accepting Ridley's appointment as his counsel." App., at A-7. By echoing the language in *Patterson*'s footnote three (". . . petitioner had not retained, or *accepted by appointment*, a lawyer . . ."), *Cobb* perpetuated the error condemned by *Montoya* and *Carter*: mere acceptance of appointed counsel does not suffice to trigger *Jackson*, because such conduct by the accused does not affirmatively demonstrate a desire to deal with the police only through counsel.

The court's own prior decision in *Holloway*, as well as the parallel reasoning in *Dew*, dictated *Cobb*'s erroneous result.[12]

The court did not and could not point to a single instance in the record where Cobb affirmatively expressed a desire to interpose an attorney between himself and the state judicial process. The court emphasized that the police twice asked Ridley's "permission" to talk to Cobb. App., at A-7. Yet the court cited no authority (because there is none) for the proposition that Ridley could assert his client's Sixth Amendment rights on his behalf. Furthermore, Ridley's undisputed testimony at the suppression hearing indicates that at no time did he ever object to the police questioning Cobb—indeed, Ridley's consistent position was to leave any objections to questioning about the disappearances up to *his client*. App., at B-6. There is no evidence that his client ever objected to the questioning or asserted his right to deal with the police only through counsel. All the evidence is, in fact, to the contrary: wracked with remorse for what he had done, Cobb voluntarily detailed his gruesome acts and voluntarily led the police to Maggie and Kori Rae's grave.

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12. Ironically, the author of *Holloway*, Judge McCormick, disavowed *Holloway* in his dissent in *Cobb*. App., at A-23 to A-25. McCormick criticized his opinion in *Holloway* for failing to address *Brewer* and for relying on footnote three in *Patterson*. *Id*. Consequently, McCormick would have declined to follow *Holloway* and would have decided that Cobb's confession was voluntary under *Brewer*. App., at A-25. To the extent that *Jackson* dictated a contrary result based on Cobb's "acceptance" of appointed counsel, McCormick would have declined to follow *Jackson*, citing *United States v. Dickerson*, 166 F.3d 667, 672 (CA4), *cert. granted*,120 S.Ct. 578 (Dec. 6, 1999). App., at A-25.

C. *Dickerson* May Provide an Additional Reason to Grant the Petition.

As Judge McCormick observed in his *Cobb* dissent, the Court has granted a writ of certiorari and heard argument in *United States v. Dickerson* to decide whether Congress validly modifies the Court's decision in *Miranda v. Arizona*, 384 U.S. 436 (1966). App., at A-20 n.9; *United States v. Dickerson*, 166 F.3d 667, 672 (CA 4), *cert. granted*, 120 S.Ct. 578 (1999). A decision by the Court that *Miranda* did not embody a requirement of constitutional law—and was therefore effectively modified by 18 U.S.C. §3501—would draw both *Edwards* and *Jackson* into serious question: *Edwards* applies a prophylactic rule designed to safeguard the protections of *Miranda* in the Fifth Amendment context, and *Jackson* applies *Edwards* in the Sixth Amendment context. *See Edwards*, 451 U.S., at 481-85; *Jackson*, 475 U.S., at 626. Should the Court in *Dickerson* find that *Miranda* is not a constitutionally mandated rule, the Court should grant this petition to decide whether *Edwards* and *Jackson* have continuing validity and whether, in light of *Dickerson*, *Jackson* dictated the Court of Criminal Appeals's decision in *Cobb*.

II. The Court of Criminal Appeals's Decision Implicates an Important and Unsettled Question Regarding the Attachment of the Sixth Amendment Right to Counsel to Factually Related Offenses.

Cobb implicates an additional, independent issue of federal constitutional law that invites this Court's attention. Relying on its own decisions in *State v. Frye*, 897 S.W.2d 324, 328-29 (Tex. Crim. App. 1995), and *Upton v. State*, 853 S.W.2d 548, 555-56 (Tex. Crim. App. 1993), as well as on the decision of the Third Circuit in *United States v. Arnold*, 106 F.3d 37, 41 (CA3 1997), the court held that Cobb's Sixth Amendment right to counsel attached to the as-yet-uncharged capital murder offense, because it was "very closely related factually" to the previously charged burglary

offense. App., at A-6. This decision implicates the "inextricably intertwined" test that state and federal courts have developed as an exception to the "offense specific" nature of the Sixth Amendment right to counsel. *See McNeil*, 501 U.S., at 175-76. The Court, not having addressed the "inextricably intertwined" test, should take this opportunity to clarify its parameters. *Cobb* presents the right opportunity because the Court of Criminal Appeals has applied the test in such a way that frustrates the ability of law enforcement to investigate related but uncharged crimes, while in no way furthering an accused's Sixth Amendment protections.

Relying on *Moulton*, the Court in *McNeil* held that the Sixth Amendment right to counsel, in contrast to its Fifth Amendment counterpart, is "offense specific." *McNeil*, 501 U.S., at 175. Consequently, once the right has been invoked, the police are prohibited from initiating interrogation outside the presence of counsel "regarding the charge at issue." *Id.*, at 179 (citing *Jackson*, 475 U.S., at 632-33). Questioning about uncharged offenses, "to which the Sixth Amendment right has not attached," does not fall within this prohibition. *Id.*, at 176 (quoting *Moulton*, 474 U.S., at 179-80).

Moulton does, however, suggest that the Sixth Amendment may attach to certain offenses that are uncharged but factually related to the charged offense. In that case, the defendant had been indicted for theft by receiving, arising from his possession of a variety of automobiles and automobile parts. *Moulton*, 474 U.S., at 162. Wishing to investigate the defendant's apparent plan to murder a witness in that case, the police used an informant to surreptitiously record the defendant's conversations. *Id.*, at 164-66. In that process, however, the police obtained more detailed incriminating information regarding the pending theft charges, leading them to reindict the defendant. *Id.*, at 167. The new indictments realleged the pending charges, but added a burglary charge; the defendant was convicted of both theft and burglary. *Id.*

Moulton held that the police had violated the defendant's Sixth Amendment right to counsel by surreptitiously eliciting incriminating statements pertaining to the pending theft charges. *Id.*, at 179-80. The Court therefore ruled his statements inadmissible at the trial of the burglary and theft charges and vacated the defendant's convictions on those charges. *Id.* The Court recognized, however, that the police "have an interest in investigating new or additional crimes"; therefore, "[i]ncriminating statements pertaining to other crimes, as to which the Sixth Amendment right has not yet attached, are, of course, admissible at a trial of those offenses." *Id.*, at 489 & n.16.

Relying primarily on *Moulton*,[13] state and federal courts have developed two related exceptions to the *McNeil* rule of "offense specific" Sixth Amendment attachment. The first exists when the uncharged offense is "inextricably intertwined" with the charged offense such that they "arose from the same predicate facts, conduct, intent and circumstances." *United States v. Arnold*, 106 F.3d 37, 41 (CA3 1997); *see United States v. Covarrubias*, 179 F.3d 1219, 1223-24 (CA9 1999); *United States v. Melgar*, 139 F.3d 1005, 1013 (CA4 1998); *United States v. Doherty*, 126 F.3d 769, 776 (CA6 1997); *United States v. Williams*, 993 F.2d 451, 457 (CA5 1993); *In re Pack*, 420 Pa. Super. 347, 356-57, 616 A.2d 1006, 1010-11 (1992); *United States v. Cooper*, 949 F.2d 737, 743-44 (CA5 1991); *People v. Clankie*, 530 N.E.2d 448, 451-52 (Ill. 1988). *See generally Commonwealth v. Rainwater*, 425 Mass.

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13. Courts have also recognized that this principle in *Moulton* was an implicit part of the Court's decision eight years before in *Brewer*. *See, e.g., People v. Clankie*, 530 N.E.2d 448, 451 (Ill. 1988). In *Brewer*, the defendant had been indicted for abduction; the Court held that the police violated his right to counsel by deliberately eliciting incriminating statements pertaining to his murder of the abduction victim. 430 U.S., at 404-05.

540, 681 N.E.2d 1218 (1997) (collecting state and federal cases); *Whittlesey v. State*, 665 A.2d 223, 233-36 (Md. 1995) (same); LAFAVE, §6.4(e), at 490-92 & n.92, 498 & n.127.

The second exception applies when there is evidence that the police have deliberately sought to circumvent an accused's Sixth Amendment right to counsel. *See Covarrubias*, 179 F.3d at 1223 & n.6; *United States v. Martinez*, 972 F.2d 1100, 1105 (CA9 1992); *United States v. Hines*, 963 F.2d 255, 258 (CA9 1992); *United States v. Mitcheltree*, 940 F.2d 1329, 1339,1342-43 (CA10 1991). *See generally Whittlesey*, 665 A.2d at 234-35 (collecting cases). Such governmental conduct has been seen to violate the government's "affirmative obligation not to act in a manner that circumvents and thereby dilutes the protection afforded by the right to counsel." *Hines*, 963 F.2d at 258 (quoting *Moulton*, 474 U.S., at 171).

An unsettled question regarding these exceptions to *McNeil* is the nature and degree of relatedness required between two offenses—one charged, the other uncharged—before the Sixth Amendment will attach to both. As the Sixth Circuit observed in *Doherty*:

> "The question of how 'inextricably intertwined' two offenses must be so that the Sixth Amendment right to counsel attaches simultaneously with respect to both offenses is open to some doubt, and we leave consideration of that question to another day." 126 F.3d, at 776.

The Court of Appeals of Maryland has observed that courts appear to interpret the "inextricably intertwined" or "closely related" exception more broadly when there is evidence of deliberate police misconduct, suggesting an analytical relationship between the two exceptions. *See Whittlesey*, 665 A.2d, at 234-35. Indeed, the Maryland court questioned whether the "inextricably intertwined" doctrine "is in fact compelled by Supreme Court precedent," but

declined to resolve the question. *Id.*, at 233-34 & n.8. *But see Melgar*, 139 F.3d, at 1013 & n.1 (identifying implicit "closely related" rule in *Moulton*).

A brief summary of some of the exemplary cases will illustrate the evolving nature of the "inextricably intertwined" exception. The seminal case is *People v. Clankie*, 530 N.E.2d 448 (Ill. 1988), in which the Supreme Court of Illinois interpreted *Brewer* and *Moulton* as standing for the proposition that the "[S]ixth [A]mendment rights of one formally charged with an offense extend to offenses closely related to that offense and for which a defendant is subsequently formally accused." *Clankie*, 530 N.E.2d, at 452. The court noted that this Court "has not yet explained just how closely related the two offenses . . . must be for the rule to apply." *Id.* The *Clankie* court, however, explicitly declined to delineate those parameters. *Id.* This was not necessary, the court observed, because in *Clankie* the subsequently charged offense involved precisely the same criminal conduct as the previously charged offense. *Id.*

Two more recent circuit cases, in an attempt to synthesize earlier case law, have developed complex, multi-factor versions of the "inextricably intertwined" exception. In *Melgar*, the Fourth Circuit stated that, to fall within the exception, "the offense being investigated must derive from the same factual predicate as the charged offense." 139 F.3d 1005, 1014 (CA4 1998) (quoting *United States v. Kidd*, 12 F.3d 30, 32 (CA4 1993)). Application of this test involves a consideration of whether the old and new charges "involve the same time, place and conduct." *Melgar*, 139 F.3d, at 1014-15. The court carefully noted, however, that a coincidence of "time, place and conduct" is not alone sufficient to invoke the exception: a defendant "must also demonstrate that the interrogation on the new offenses produced incriminating evidence as to the previously charged offenses." *Id.*, at 1015. In this context,

the court construed "incriminating" evidence to include "any evidence damaging to the defendant's case." *Id.*[14]

In *Covarrubias*, the Ninth Circuit further elaborated upon the exception. 179 F.3d 1219 (CA9 1999). From *Brewer* and *Moulton*, the court gleaned the "indisputable implication" that "the right to counsel may attach to other offenses as long as there is a close enough relationship to the conduct that formed the basis for the initially charged crime." *Id.*, at 1224. Generally, the court advocated "an examination and comparison of all of the facts and circumstances relating to the conduct involved," considering in particular (1) the identity of the persons involved (including the victim, if any), and (2) the timing, motive, and location of the crimes. *Id.*, at 1225. In *Covarrubias*, the initially charged offense was a state kidnapping charge; the subsequently charged offense was the federal crime of transporting illegal immigrants. *Id.*, at 1221-22. In applying its test to the two offenses (and finding them "closely related" for Sixth Amendment attachment purposes), the court stressed that they "involved a continuous course of conduct" and that the federal charge was a "continuing offense." *Id.*, at 1225-26.[15]

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14. The "incriminating evidence" prong of the *Melgar* test is reminiscent of the test applied in *In re Pack*, in which the Superior Court of Pennsylvania found that the improperly elicited statement "tended to prove" both the subsequently charged and the previously charged offenses. *In re Pack*, 420 Pa. Super., at 356, 616 A.2d, at 1011; *see Whittlesey*, 665 A.2d, at 235 (citing *Pack*, and observing that "[a]nother test employed by at least one court is whether the statements elicited by the police constituted evidence of both offenses").

15. In *Whittlesey*, the Maryland Court of Appeals surveyed the application by state and federal courts of the "inextricably intertwined" exception. *See* 665 A.2d, at 235. The *Whittlesey* court noted the variety of factors applied by the courts, including: (1) whether new charges arise from "the same acts on which the [pending] charges were based"; (2) whether there is an "identity of time, place, and conduct"; (3) whether there is an "identity of prosecuting sovereign"; and (4) "whether the statements elicited by the police constitute evidence of both offenses." *Id.* (citations omitted).

This Court should clarify the parameters of the "inextricably intertwined" exception to *McNeil*. The Court's decisions in *Brewer*, *Moulton*, and *McNeil* leave open the question of what relationship must exist between charged and uncharged offenses before the panoply of Sixth Amendment protections will attach to both. Clarity in this area is essential because, as the Court observed in *Moulton*,

> "to exclude evidence pertaining to charges as to which the Sixth Amendment right to counsel had not attached, simply because other charges were pending at the time, would unnecessarily frustrate the public's interest in the investigation of criminal activities." 474 U.S., at 180.

Nowhere is that concern more apparent than in a case like *Cobb*, where the majority's inappropriate application of the "inextricably intertwined" test resulted in the suppression of an otherwise valid confession without furthering any Sixth Amendment interest. Any extension of the Sixth Amendment beyond the charged offense is intended to protect the defendant's invoked right to counsel as to the charged offense. But it cannot be disputed that the police in this case were not attempting to gather additional evidence relating to the burglary charge, to which Cobb had already confessed.

The facts of *Cobb* do not implicate the "inextricably intertwined" exception as developed in the lower courts. Specifically, while there was a similarity of "time" and "place" in Cobb's conduct that resulted in both burglary and murder, the murder charge, as prosecuted, was based on criminal acts distinct from the burglary. *See, e.g., Cooper*, 949 F.2d, at 744 (declining to

apply exception to two offenses involving "different conduct"). Additionally, the interrogation of Cobb that resulted in his confession to the murders could not possibly have produced evidence incriminating him on the burglary charge—Cobb, after all, had already confessed to the burglary. *See, e.g., Melgar*, 139 F.3d, at 1015 (applying "incriminating evidence" prong of exception); *Pack*, 420 Pa. Super., at 356, 616 A.2d, at 1011 (applying "evidence of both offenses" test). Furthermore, the two offenses did not share an "identity of persons." *See, e.g., Covarrubias*, 179 F.3d, at 1225 (considering the "identity of the persons involved"). The focus of Cobb's burglary was the Owings' property, while the focus of his murders was the Owings themselves. Moreover, by its very nature burglary is not a "continuing offense." *See id.*, at 1225-26 (considering the "continuing nature" of the offense). The offense was completed the moment Cobb entered the Owings home with the intent to commit a theft. TEX. PENAL CODE §30.02(a)(1); *see Garcia v. State*, 571 S.W.2d 896, 899 (Tex. Crim. App.1978) (offense of burglary complete upon entering habitation with intent to commit felony or theft).

Most fundamentally, however, Cobb was convicted of capital murder based—*not* on burglary as a predicate felony—but rather on multiple murders committed in the same transaction. *See* App., at C-1, D-4 ¶13, E-4. Thus, even if Cobb had previously "asserted" his right to counsel in response to the burglary charge,[16] no statements thereafter made by Cobb were ever used against him *with respect to burglary*, but only with respect to murder. Because of the legal basis for Cobb's capital murder conviction, the burglary and the murders were legally and factually distinct. *Cf. Moulton*, 474 U.S., at 167 (improperly elicited statements used to convict defendant on *both* the subsequently charged burglary *and* the previously charged theft). The lower courts do not appear to have

16. Part I, *supra*, shows that he did not, however.

developed this aspect of the "inextricably intertwined" exception.[17] This Court should address it in this case.

Finally, the policy justification behind the "inextricably intertwined" exception cannot support the result in *Cobb*. Courts have applied the exception for one overriding purpose: to prevent the government from "circumvent[ing] the Sixth Amendment right to counsel merely by charging a defendant with additional related crimes." *See Arnold*, 106 F.3d, at 41 (quoting *In re Pack*, 420 Pa. Super., at 356, 616 A.2d, at 1011). There is no suggestion here that the police plotted to circumvent Cobb's right to counsel by charging him with "additional related crimes." Undisputedly, Cobb had already confessed to the burglary when new evidence—his father's testimony—came to light. It was this new evidence, and not some malevolent design of the police to deny Cobb his right to counsel, that led to his arrest for the murders. What makes this even plainer is that the murders and the burglary, while fortuitously linked by time and place, were legally distinct: burglary was not

17. Indeed, the only decision on this issue appears to be from the Texas Court of Criminal Appeals in *Upton*, a case relied upon by the majority in *Cobb*. App., at A-6. In *Upton*, the defendant had been indicted for theft and burglary; the police then obtained incriminating statements from the defendant about a murder arising from the same factual scenario as the pending charges. 853 S.W.2d, at 554. The prosecution charged the defendant with capital murder, the aggravating element being that he committed the murder in the course of the previously charged robbery. *Id.*, at 555. In ruling that the defendant's right to counsel had been violated, the court reasoned that, when the police questioned the defendant about the murders, they were not investigating "new or additional crimes" under *Moulton* because "adversarial proceedings had begun against [the defendant] on at least one important element of the offense for which he was later charged." *Id.*, at 555-56.

the predicate felony for Cobb's capital murder conviction and the elements of the two crimes did not overlap.

Cobb committed burglary by entering the Owings' home with the intent to steal their property. Soon after that, Cobb cruelly and brutally murdered Maggie and Kori Rae Owings. Under the Court of Criminal Appeals's application of the "inextricably intertwined" test, Cobb had the good fortune to commit his murders close on the heels of his burglary. The Court should grant the State's petition both to correct that unjustifiable result, and also to clarify the appropriate test for attachment of the Sixth Amendment right to counsel to factually related offenses.

CONCLUSION

The Court of Criminal Appeals's decision in this case implicates two important and unsettled areas of Sixth Amendment law. This Court should grant the State's petition to resolve these critical aspects of federal constitutional jurisprudence.

Respectfully submitted,

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APPENDIX A

Raymond Levi COBB, Appellant,
v.
The STATE of Texas.

No. 72,807.

Court of Criminal Appeals of Texas,
En Banc.

March 15, 2000.

Before the court en banc.

OPINION

MANSFIELD, J., delivered the opinion of the Court, in which MEYERS, PRICE, HOLLAND, WOMACK, and JOHNSON, JJ., joined.

Appellant, Raymond Levi Cobb, was found guilty of intentionally killing two people in a single criminal transaction. *See* TEX. PEN. CODE §19.03. His punishment was assessed at death. In eleven points of error, he argues that he is entitled to a new trial or at least a reformation of his sentence from death to imprisonment for life. We will reverse the judgment of the trial court and remand the cause for a new trial.

We turn first to appellant's eleventh point of error, in which he contends that the evidence adduced at trial was legally insufficient to support the jury's affirmative answer to the first punishment issue, concerning his future dangerousness. *See* Art. 37.071,

§2(b)(1).[1] Appellant argues that the evidence was insufficient because (1) he was only seventeen years old at the time of the offense, (2) he had no prior history of violent conduct, (3) he had no prior convictions, (4) the testimony of prosecution witness Dr. Frederick Mears, a licensed clinical psychologist, was "inherently unreliable" and thus inadmissible because he did not actually examine appellant, and (5) defense witness Dr. Walter Quijano, also a licensed clinical psychologist, testified that appellant would not likely be a future danger if imprisoned for life.

Under the first punishment issue, the jury was asked to determine "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." Art. 37.071, §2(b)(1). The State had the burden of proving the first punishment issue beyond a reasonable doubt. Art. 37.071, §2(c). Thus, the State had the burden of proving beyond a reasonable doubt that there is a probability that appellant, if allowed to live, would commit criminal acts of violence, so as to constitute a continuing threat, whether in or out of prison. *Narvaiz v. State*, 840 S.W.2d 415, 424 (Tex.Crim.App.1992), *cert. denied*, 507 U.S. 975, 113 S.Ct. 1422, 122 L.Ed.2d 791 (1993). In its determination of this issue, the jury was entitled to consider all of the evidence presented at both the guilt/innocence and punishment stages of trial. *Valdez v. State*, 776 S.W.2d 162, 166-167 (Tex.Crim.App.1989), *cert. denied*, 495 U.S. 963, 110 S.Ct. 2575, 109 L.Ed.2d 757 (1990). As an appellate court reviewing the jury's finding, we view all of the record evidence, whether properly or improperly admitted, in the light most favorable to the prosecution, and then determine whether, based on that evidence, any rational jury could have found beyond a reasonable doubt that the answer to the first punishment issue was "yes." *Miles v. State*, 918 S.W.2d

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[1]All references to articles are to those in the Texas Code of Criminal Procedure.

511, 512 (Tex.Crim.App.1996); *Harris v. State*, 738 S.W.2d 207, 225-226 (Tex.Crim.App.1986), *cert. denied*, 484 U.S. 872, 108 S.Ct. 207, 98 L.Ed.2d 158 (1987). This standard of review gives full play to the jury's responsibility to fairly resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from the evidence. *See Jackson Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979). If we find that the evidence was legally insufficient to support the jury's affirmative answer, then we must reform the trial court's judgment to reflect a sentence of life imprisonment. Art. 44.251(a).

Viewed in the necessary light, the evidence at the guilt/innocence stage established that sometime between 5:45 a.m. and 5:15 p.m., December 27, 1993, appellant burglarized the Lindsey and Margaret Owings residence in a rural part of Walker County and stole a stereo system, a videocassette recorder, and other items. In the course of the burglary, appellant intentionally killed 22-year-old Margaret Owings and sixteen-month-old Kori Rae Owings. The evidence at the punishment stage, viewed in the necessary light, established that appellant has a dangerous personality disorder and lacks any regard for the welfare of others. We hold that, based on the totality of the evidence presented at trial, a rational jury could have found beyond a reasonable doubt that appellant is dangerous and incorrigible and that the answer to the first punishment issue is "yes." The jury was not required to give controlling weight to appellant's youth or lack of a violent past or criminal record. Nor was the jury required to give controlling weight to Dr. Mears' failure to examine appellant personally. We overrule appellant's eleventh point of error.

We turn next to appellant's fourth point of error, in which he contends that the trial court erred in admitting in evidence, at the guilt/innocence stage, a written statement he gave to police shortly after his arrest. Appellant, citing *Michigan v. Jackson*, 475 U.S.

625, 106 S.Ct. 1404, 89 L.Ed.2d 631 (1986), and *Upton v. State*, 853 S.W.2d 548 (Tex.Crim.App.1993), argues that the police obtained the statement in violation of his Sixth Amendment right to counsel because the police initiated interrogation of him without first notifying his counsel of record. The State argues in response that, at the time the police interrogated appellant, his Sixth Amendment right to counsel had not yet attached. The State argues in the alternative that even if the right had attached, the right had been waived because on two previous occasions defense counsel had allowed police to interrogate appellant without counsel being present.

The facts relevant to this point of error are as follows: On December 27, 1993, Lindsey Owings notified the Walker County Sheriff's Office that his home had been burglarized and that some of his property had been stolen. He also reported that his wife, Margaret, and his daughter, Kori Rae, were missing. Sometime in early February 1994, the sheriff's office received an anonymous tip that appellant, who resided across the street from the Owings residence, might have been involved in the burglary. Walker County investigators questioned appellant about the burglary and the disappearances, but he denied any involvement. On July 15, 1994, after further questioning by investigators, appellant, who was then under arrest in an unrelated case, gave a written statement in which he confessed to the burglary. He continued to insist, however, that he knew nothing about the disappearances. A Walker County grand jury subsequently indicted appellant for the burglary.

On August 15, 1994, attorney Hal Ridley was appointed to represent appellant in the burglary case. Shortly thereafter, Walker County investigators sought Ridley's permission to question appellant again about the disappearances. Ridley gave his permission, but only after being assured that appellant was not a

suspect in the disappearances. The investigators then questioned appellant, and he again denied any involvement.

On September 13, 1995, Walker County investigators again sought Ridley's permission to question appellant about the disappearances, and again he gave permission, still believing that appellant was not a suspect. During the questioning, appellant again denied any involvement.

On November 11, 1995, appellant's father, Charles Cobb, who resided in Odessa, telephoned the Walker County Sheriff's Office with information regarding appellant, who was then free on bond in the still-pending burglary case and also residing in Odessa. Mr. Cobb reported that appellant had just confessed to him that he had killed Margaret Owings while in the course of burglarizing her home and that he had buried her body in a wooded area not far from the home. Walker County investigators instructed Mr. Cobb to proceed to an Odessa police station to give a statement, which he did. The Odessa police faxed Mr. Cobb's statement to Walker County, and investigators there used the statement to obtain an arrest warrant, which they faxed back to Odessa. The Walker County investigators neglected, however, to inform the Odessa police that appellant had counsel in the burglary case. The Odessa police then located appellant, arrested him, Mirandized[2] him, and interrogated him. After ninety minutes of questioning, appellant gave a written statement in which he admitted killing both Margaret and Kori Rae Owings while in the course of burglarizing their home.

Having explicated the relevant facts, we turn now to the relevant law, which is both settled and familiar. The Sixth

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[2] *See Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

Amendment to the Constitution of the United States provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defence." This right to counsel was made applicable to state felony prosecutions by the Due Process Clause of the Fourteenth Amendment. *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 797, 9 L.Ed.2d 799 (1963). The purpose of the right to counsel is to protect the unaided layman after the adverse positions of government and defendant have solidified with respect to a particular alleged crime. *McNeil v. Wisconsin*, 501 U.S. 171, 111 S.Ct. 2204, 2209, 115 L.Ed.2d 158 (1991). The right thus attaches at the initiation of adversarial proceedings, whether by way of formal charge, preliminary hearing, indictment, information, or arraignment, and no request for counsel need be made by the accused. *Brewer v. Williams*, 430 U.S. 387, 97 S.Ct. 1232, 1239, 1242, 51 L.Ed.2d 424 (1977). Once the Sixth Amendment right to counsel attaches, government efforts to elicit information from the accused, including interrogation, represent "critical stages" at which the right to counsel applies. *Michigan v. Jackson*, 106 S.Ct. at 1407-1408. Therefore, for the fruits of post-indictment interrogations to be admissible in a prosecution's case-in-chief, the State must prove a voluntary, knowing, and intelligent waiver of the right to counsel. *Patterson v. Illinois*, 487 U.S. 285, 108 S.Ct. 2389, 2394-2395, 101 L.Ed.2d 261 (1988). However, once the right to counsel has attached and has been invoked, any subsequent waiver during police-initiated interrogation is ineffective unless counsel has first given permission for the interrogation. *Michigan v. Jackson*, 106 S.Ct. at 1411.

Also relevant to this case is the Sixth Amendment rule that once the right to counsel attaches to the offense charged, it also attaches to any other offense that is very closely related factually to the offense charged. *State v. Frye*, 897 S.W.2d 324, 328-329 (Tex.Crim.App.1995); *Upton v. State*, 853 S.W.2d at 555-556; *accord*, *United States v. Arnold*, 106 F.3d 37, 41 (3rd Cir.1997),

and cases cited therein; *see* 2 W. LaFAVE, ET AL., CRIMINAL PROCEDURE §6.4(f) n.127 (2nd ed.1999). This rule prevents the government from circumventing the Sixth Amendment right to counsel merely "by charging a defendant with additional crimes after questioning him without counsel present," *United States v. Arnold*, 106 F.3d at 41, or "by charging predicate crimes with the purpose of questioning a suspect on an aggravated crime," *Upton v. State*, 853 S.W.2d at 556.

Relevant to this case, too, is the "Sixth Amendment ... require [ment] that we impute the State's knowledge from one state actor to another." *Michigan v. Jackson*, 106 S.Ct. at 1410. "One set of state actors (the police) may not claim ignorance of defendants' unequivocal request for counsel to another state actor (the court)." *Ibid.*

We now apply these rules of law to the case at bar. Once appellant was indicted for the Owings burglary, his Sixth Amendment right to counsel attached to that offense and to the capital murder offense, which was factually interwoven with the burglary. It is also true that once appellant's right to counsel attached, he asserted it by accepting Ridley's appointment as his counsel. Therefore, before the Odessa police could lawfully question appellant about the disappearances of the Owings, they were under an obligation to contact Ridley and get his permission. They failed to do that. Consequently, the fruits of the Odessa police interrogation, including appellant's written statement, were inadmissible in the prosecution's case-in-chief.

The fact that Ridley twice gave permission to Walker County investigators to question appellant is irrelevant. Nothing in the record suggests that Ridley's permission was intended to be continuing or could have reasonably been so interpreted.

Having found constitutional error, we still need not reverse appellant's conviction if we determine that the error was harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 828, 17 L.Ed.2d 705 (1967); TEX. R. APP. PROC. 44.2(a). If there is a reasonable likelihood that the error materially affected the jury's deliberations, then the error was not harmless beyond a reasonable doubt. *Satterwhite v. Texas*, 486 U.S. 249, 108 S.Ct. 1792, 1797, 100 L.Ed.2d 284 (1988).

The record reflects that appellant's statement was incriminating and central to the prosecution's case against him. Therefore, a reasonable likelihood exists that the admission of the statement in evidence materially affected the jury's deliberations.

We sustain appellant's fourth point of error. In view of our disposition of appellant's fourth point of error, we need not address his remaining points of error. The judgment of the trial court is reversed, and the case is remanded for a new trial.

DISSENTING OPINION

McCORMICK, P.J, delivered a dissenting opinion in which KELLER and KEASLER, JJ., joined.

I respectfully dissent. Neither the facts nor the law support the Court's decision to suppress appellant's voluntary confession. Because appellant lost in the trial court on his suppression motion, no one can dispute that the Court is required to view the evidence in the light most favorable to the trial court's decision to admit appellant's voluntary confession.[1] But, the Court's opinion does not view the evidence this way and, consequently, it misstates key facts upon which it decides to suppress appellant's voluntary confession.

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[1] *See Guzman v. State*, 955 S.W.2d 85, 89 (Tex.Cr.App.1997).

More important is that even under the Court's version of the facts, the law is not as "settled and familiar" as the Court's opinion would have it. Various United States Supreme Court precedents can be read to support two contrary holdings in this case. I would either apply the body of law that balances the competing interests in favor of admitting appellant's voluntary confession[2] or, assuming the other body of law requires suppression of appellant's voluntary confession, I would decline to follow it.

I. THE RELEVANT FACTS UNDER A PROPER APPLICATION OF THE GUZMAN STANDARD OF REVIEW REQUIRING THE COURT TO VIEW THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO THE TRIAL COURT'S RULING ON APPELLANT'S SUPPRESSION MOTION.

Appellant voluntarily confessed during police-initiated custodial interrogation to murdering a mother and burying her baby alive. According to appellant's voluntary confession, he stabbed the mother while burglarizing her home. He took the mother's body to some "woods a good ways away from the house, maybe two or three hundred yards from her house." Appellant's voluntary confession then states:

> "I went back to her house and I saw the baby laying on its bed. I took the baby out there and it was sleeping the whole time. I laid the baby down on the ground four or five feet away from its mother. I went back to my house and got a flat edge shovel. That's all I could find. Then I went back

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[2] *See McNeil v. Wisconsin*, 501 U.S. 171, 111 S.Ct. 2204, 2210, 115 L.Ed.2d 158 (1991) ("ready ability to obtain uncoerced confessions is not an evil but an unmitigated good" and is "essential to society's compelling interest in finding, convicting, and punishing those who violate the law").

> over to where they were and I started digging a hole between them. After I got the hole dug, the baby was awake. It started going toward its mom and it fell in the hole. I put the lady in the hole and I covered them up. I remember stabbing a different knife I had in the ground where they were. I was crying right then."

Appellant made this voluntary confession approximately 15 months after Ridley had been appointed to represent appellant on a formal charge of burglarizing the victims' home. During these 15 months appellant admitted only to burglarizing the victims' home. Also, during these 15 months the police were unable to find the victims. The police considered appellant a suspect in the victims' disappearances. Appellant made bond in the burglary case and he moved to another town.

When appellant voluntarily confessed to murdering the victims, appellant had been arrested on a warrant which was based on new information the police received from appellant's father who implicated appellant in the victims' murders. Appellant had confessed to his father that he killed the victims.

Soon after appellant's arrest the police questioned appellant and he voluntarily confessed to murdering the victims. Ridley was unaware that appellant's father had implicated appellant in the victims' murders or that appellant had been arrested for and questioned by the police about the victims' murders.

Before appellant voluntarily confessed, the police informed appellant of his right to have a lawyer present during the interrogation and appellant unilaterally and voluntarily waived that right. The police who obtained appellant's confession were unaware that Ridley represented appellant in the burglary case. Shortly after

appellant voluntarily confessed, he led the police to where he buried the victims' bodies.

The Court's opinion asserts as a matter of fact that Ridley gave the police permission to question appellant "but only after being assured that appellant was not a suspect in the disappearances." The implication seems to be that any permission the police had from Ridley to question appellant when appellant voluntarily confessed was ineffective because this permission was obtained fraudulently. But, viewed in the light most favorable to the trial court's ruling, the evidence supports a contrary finding.

Although Ridley testified that he did not know until September 1995 that appellant was a suspect in the victims' disappearances, Ridley also admitted that the police "always said they thought [appellant] knew more than what he was saying" about the victims' disappearances.

> "Q. You have heard the testimony the last two days from Detective Judy James and Detective Debbie Funk--or actually you did not hear Debbie Funk's testimony, but they indicated that Cobb was always a suspect in this case.
> "A. Well, I had gone out to the jail on another matter later. After Haley and James spent about three hours with him that day I went out to the jail, probably the next week, to see some other people and got in a conversation with Sheriff Meyers. And Sheriff Meyers at that time personally told me that he thought Cobb was a suspect all along. He flat told me he thought Cobb was guilty; he just couldn't prove it. And that was the first time I was aware--
> "Q. What date is--
> "A. This would have been about a week after Haley and James talked to him. It was that same month. This was prior to the news breaking, though, that he had given a

statement. "Q. This was after Haley and James' contact with him with your permission on September 13, 1995, approximately a week later?
"A. Right.
"Q. But prior to that no law enforcement personnel had ever informed you that Cobb was a suspect?
"A. They always said they thought he knew more than he what he was saying, but in fact I still had no reason to believe the person I was originally informed was the suspect wasn't still the suspect." (Emphasis Supplied).

This testimony together with the evidence that appellant admitted burglarizing the victims' home at the time they disappeared support a finding that Ridley knew all along that appellant was a suspect in the victims' disappearances. And, even if Ridley did not know until September 1995 that appellant was a suspect, there still is no evidence that upon learning this information Ridley withdrew the unqualified permission he had twice given to the police to question appellant.

The Court's opinion, however, asserts as a matter of fact that this is "irrelevant" because nothing "in the record suggests that Ridley's permission was intended to be continuing or could have reasonably been so interpreted." Viewed in the light most favorable to the trial court's ruling, the evidence supports contrary findings. Ridley twice gave the police permission to question appellant. Significantly, neither the police nor Ridley testified that this permission was in any way limited. Detective Haley testified that in September 1995 when Ridley gave him permission to question appellant and when, according to Ridley, this was when Ridley learned appellant was a suspect in the victims' disappearances, Ridley "said it was okay, if it was okay with" appellant.

"Q. This was on September--

"A. September the 13th, 1995.
"Q. And he agreed to participate or cooperate with you?
"A. Yes, sir.
"Q. In fact you discussed this with his attorney and the attorney said it was okay, if it was okay with [appellant]?
"A. Yes, sir." (Emphasis Supplied).

Ridley testified that he allowed law enforcement to speak with appellant.

"Q. You have always allowed law enforcement to speak with your clients even outside your presence?
"A. I have in the past, or--
"Q. Yes.
"A. I have in the past on certain occasions, and I did in this case."

Ridley even gave the police permission to take appellant to the location of the victims' bodies soon after appellant voluntarily confessed to murdering them.

"Q. All right.
"A. And then I was contacted the next evening, and I thought--it may have been James that called me, but I thought it was David Weeks that asked if [appellant] could go out there and--
"Q. Again?
"A. Yeah. This would have been the next night, and asked if [appellant] could go out there or if I had any objections to him going out there with Haley and James. And then he left me--I think he left me the number to call James directly and contact her. I think that's how that went because for some reason I almost want to swear that I was--I had talked to him first about it. And I told him, 'Well, you know, I don't

know what else he could tell you,' but I did not deny them permission to take him out there."
(Emphasis Supplied).

Ridley also testified that any contact the police may have had with appellant after November 14th "was without [his] permission."

"Q. To the best of your knowledge he has not had any further contact?
"A. Shouldn't have had after [November 14th]. If he did, it was without my permission." (Emphasis Supplied).

From this testimony alone, the trial court could have found that the police had Ridley's permission to question appellant at any time before November 14, 1995. Contrary to the factual assertions in the Court's opinion, there is evidence in the record to support a finding "that Ridley's permission was intended to be continuing" as long as "it was okay" with appellant.

As to the Court's factual assertion that Ridley's permission could not reasonably have been interpreted as being continuing, the evidence, viewed in the light most favorable to the trial court's ruling, supports a contrary finding. The record supports a finding that, having twice received permission from Ridley to question appellant, the police without contacting Ridley questioned appellant on other occasions even though Ridley might have been under the impression that the police contacted him whenever they wanted to question appellant.[3]

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[3] "Q. So prior to November, 1995, every time the law enforcement officials and/or members of the District Attorney's Office decided they needed to talk to [appellant] concerning the disappearance of [the victims] they always contacted you and asked you for your permission?
"A. I would say yes because [appellant] never called me and indicated

For example, Detective Thomas testified that the police had questioned appellant on "previous occasions."

"Q. So to clarify this, Detective James indicated to you that they had talked to [appellant] on previous occasions and he had never indicated on these previous occasions that he had any involvement in the disappearance of the [victims]?
"A. Right."

Later, Detective Thomas testified that the police had questioned appellant "several times."

"Q. All right. What happened next?
"A. Detective Sikes began a line of questioning about the disappearance of the [victims], and [appellant] denied it. [Appellant] went into about talking to the investigators here in Walker County, and he said he had already spoken with them several times. He had been arrested on a burglary charge stemming out of this same investigation. And he denied over and over that he had nothing (sic) to do with them missing, and he got somewhat agitated with Detective Sikes." (Emphasis Supplied).

In any event it makes no difference that the police may have contacted Ridley whenever they wanted to question appellant because, viewed in the light most favorable to the trial court's ruling, the evidence supports a finding that the police had Ridley's permission to question appellant at any time before November 14th as long as "it was okay" with appellant. In deciding otherwise, the Court misapplies the Guzman standard of review by not viewing

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otherwise, and on each occasion I gave my permission believing he wasn't a suspect." (Emphasis Supplied).

the evidence in the light most favorable to the trial court's ruling on appellant's suppression motion.

II. EVEN UNDER THE COURT'S VERSION OF THE FACTS, APPELLANT'S VOLUNTARY CONFESSION IS STILL ADMISSIBLE

The Court decides: (1) the police violated a prophylactic rule meant to safeguard the Sixth Amendment right to counsel when the police initiated questioning of appellant after he had "asserted" his Sixth Amendment right to counsel during arraignment on the burglary charge some 17 months before appellant confessed, and (2) suppression of appellant's voluntary and reliable confession is the appropriate remedy as a means to deter the kind of "egregious police misconduct" that the Court implicitly decides occurred in this case. I would decide that the police did not violate any prophylactic rule meant to safeguard the Sixth Amendment right to counsel and that appellant made a valid waiver of his Sixth Amendment right to counsel before he voluntarily confessed.

For reasons more fully set out in this opinion, the federal constitutional issue actually presented is: can a represented-by-counsel defendant whose Sixth Amendment right to counsel has attached to an offense unilaterally make a valid waiver of this Sixth Amendment right to counsel upon police-initiated interrogation about this offense? Some United States Supreme Court precedent supports holding that such a defendant can unilaterally make a valid waiver of his Sixth Amendment right to counsel even when that defendant previously has asserted his Sixth Amendment right to counsel. *See generally State v. Frye*, 897 S.W.2d 324, 331-32 (Tex.Cr.App.1995) (McCormick, P.J., concurring and dissenting).

In *Brewer v. Williams*, the United States Supreme Court in a lead opinion authored by Justice Stewart and joined by Justice Brennan decided that a defendant in a case like this did not validly waive his Sixth Amendment right to counsel. *See Brewer v. Williams*, 430 U.S. 387, 97 S.Ct. 1232, 1243, 51 L.Ed.2d 424 (1977). The Court, however, decided that such a defendant could unilaterally make a valid waiver of his Sixth Amendment right to counsel even when the defendant previously has asserted his right to counsel, otherwise it would have been unnecessary for Brewer to decide whether the defendant validly waived his right to counsel:

> "Despite Williams' express and implicit assertions of his right to counsel, Detective Leaming proceeded to elicit incriminating statements from Williams. Leaming did not preface this effort by telling Williams that he had a right to the presence of a lawyer, and made no effort at all to ascertain whether Williams wished to relinquish that right. The circumstances of record in this case thus provide no reasonable basis for finding that Williams waived his right to the assistance of counsel.
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> "The Court of Appeals did not hold, nor do we, that under the circumstances of this case[4] [the defendant] could not, without notice to counsel, have waived his rights under the Sixth and Fourteenth Amendments. [Footnote Omitted]. It only held, as we do, that he did not."

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[4] Consistent with how the Court's opinion characterizes the circumstances of this case, the "circumstances of [the *Brewer*] case" involved police-initiated interrogation of a represented-by-counsel and formally charged defendant who had asserted his Sixth Amendment right to counsel. *See Brewer*, 97 S.Ct. at 1242-43.

Williams, 97 S.Ct. at 1243 (Emphasis in Original); *see also Frye*, 897 S.W.2d at 332 (McCormick, P.J., concurring and dissenting).

Several Justices filed separate concurring and dissenting opinions in Brewer. Justice Marshall's and Justice Powell's concurring opinions joined Justice Stewart's lead opinion. *See Brewer*, 97 S.Ct. at 1244-45 (Marshall, J., concurring) and at 1245-47 (Powell, J., concurring). Justice Stevens' concurring opinion also joined Justice Stewart's lead opinion and the concurring opinions of Justices Powell and Marshall. *See Brewer*, 97 S.Ct. at 1247-48 (Stevens, J., concurring).[5]

Chief Justice Burger filed a dissenting opinion. *See Brewer*, 97 S.Ct. at 1248-55 (Burger, C.J., dissenting). His dissenting opinion, consistent with Justice Stewart's lead opinion, recognized "that a valid waiver was possible in these circumstances, but was not quite made." *See Brewer*, 97 S.Ct. at 1250 (Burger, C.J., dissenting) (Emphasis in Original).

Justice White also filed a dissenting opinion which was joined by Justices Rehnquist and Blackmun. *See Brewer*, 97 S.Ct. at

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[5] The concurring opinions of Justices Marshall, Powell and Stevens arguably failed to understand that Justice Stewart's lead opinion decided that the defendant unilaterally or "without notice to counsel" could have made a valid waiver of his "rights under the Sixth and Fourteenth Amendments." *Compare Brewer*, 97 S.Ct. at 1243 (Stewart, J.), *with, Brewer*, 97 S.Ct. at 1244-45 (Marshall, J., concurring) (apparently would have decided that the defendant could not unilaterally make a valid waiver of his Sixth and Fourteenth Amendment rights), and at 1246 (Powell, J., concurring) (erroneously claiming that Justice Stewart's lead opinion was "explicitly clear that the right to assistance of counsel may [not] be waived, after it has attached, without notice to or consultation with counsel"), and at 1247-48 (Stevens, J., concurring).

1255-59 (White, J., dissenting). His dissenting opinion, consistent with Justice Stewart's lead opinion, also recognized that Justice Stewart's lead opinion created "no new rule preventing an accused who has retained a lawyer from waiving his right to the lawyer's presence during questioning." *See Brewer*, 97 S.Ct. at 1257 (White, J., concurring).

So, as things stood in 1977 when Brewer was decided, at least six United States Supreme Court Justices, a majority, shared the view that a defendant could unilaterally make a valid waiver of his Sixth Amendment right to counsel even when the defendant previously has asserted his Sixth Amendment right to counsel. *See Brewer*, 97 S.Ct. at 1243 (Stewart, J., joined by Brennan, J.), and at 1250 (Burger, C.J., dissenting), and at 1257 (White, J., dissenting, joined by Blackmun and Rehnquist, J.J.).[6] And, as late as 1985 other United States Supreme Court precedent was consistent with *Brewer* in Sixth Amendment cases[7] despite the soon to be discussed United States Supreme Court adoption of various prophylactic rules in the Fifth Amendment context.

This brings us to the "relevant law" which the Court's opinion claims is "settled and familiar." The Court's opinion relies on *Michigan v. Jackson* which in 1986 applied the just mentioned Fifth

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[6] And, arguably the three other Justices in *Brewer* subscribed to this view since they joined Justice Stewart's lead opinion instead of concurring in the judgment or the result.

[7] *See Moran v. Burbine*, 475 U.S. 412, 106 S.Ct. 1135, 1144, 89 L.Ed.2d 222 (1985) ("It is clear, of course, that, absent a valid waiver, the defendant has the right to the presence of an attorney during any interrogation occurring after the first formal charging proceeding, the point at which the Sixth Amendment right to counsel initially attaches"). (Emphasis Supplied).

Amendment *Miranda v. Arizona*/*Edwards v. Arizona*[8] prophylactic rules to the Sixth Amendment context. *See Michigan v. Jackson*, 475 U.S. 625, 106 S.Ct. 1404, 1411, 89 L.Ed.2d 631 (1986).[9] *Jackson* held that "if police initiate interrogation after a defendant's assertion, at an arraignment or similar proceeding, of his right to counsel, any [unilateral] waiver of the defendant's right to counsel for that police-initiated interrogation is invalid." *See Jackson*, 106 S.Ct. at 1411.

But, *Jackson*, instead of overruling or disapproving *Brewer*, actually relied on *Brewer*. *See Jackson*, 106 S.Ct. at 1410 fn. 9. This is curious since *Brewer* is flatly inconsistent with and contrary

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[8] *See Edwards v. Arizona*, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981); *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

[9] Just as the *Miranda v. Arizona*/*Edwards v. Arizona* prophylactic rules are not Fifth Amendment rights but are meant to safeguard the underlying Fifth Amendment right against compelled self-incrimination, the *Jackson* prophylactic rule also is not a Sixth Amendment right but is meant to safeguard the underlying Sixth Amendment right to counsel. *See Baker v. State*, 956 S.W.2d 19, 23-24 (Tex.Cr.App.1997). This raises the question of whether, under principles of federalism, we are even required to follow *Jackson*. *See United States v. Dickerson*, 166 F.3d 667, 672 (4th Cir.), *cert. granted*, S.Ct. (1999) (*Miranda* is not a constitutional rule so Congress had the power to overrule it).

It also should be noted that the United States Supreme Court is currently reconsidering *Miranda* in favor of a pure voluntariness test. See id.; *see also Brewer*, 97 S.Ct. at 1259 (Blackmun, J., dissenting) (noting that at least 22 states were urging the Supreme Court to overrule *Miranda*). If the Supreme Court overrules *Miranda* and adopts a voluntariness test, then that would render cases like *Edwards* and *Jackson* obsolete and the issue in this case moot. The Court should, therefore, hold this case until the Supreme Court decides whether to retain *Miranda*.

to *Jackson*'s holding. *See Jackson*, 106 S.Ct. at 1413 (Rehnquist, J., dissenting). This creates a conflict between *Brewer* and *Jackson* either of which the Court may choose to apply.

And, having chosen to apply *Jackson*, the Court's opinion fails to appreciate that this case is distinguishable from *Jackson* in three important respects. In *Jackson* the police initiated interrogation of the defendants shortly after their "request" for counsel at arraignment. *See Jackson*, 106 S.Ct. at 1406. In this case, however, the police initiated interrogation some 17 months after appellant's arraignment.[10]

Another distinction between this case and *Jackson* is that appellant did not unequivocally assert his right to counsel at any time before the police-initiated interrogation. The evidence is to the contrary. [11]

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[10] *See Jackson*, 106 S.Ct. at 1413 (Rehnquist, J., dissenting) ("the Court most assuredly does not hold that the *Edwards* per se rule prohibiting all police-initiated interrogation applies from the moment the defendant's Sixth Amendment right to counsel attaches, with or without a request for counsel by the defendant").

[11] *Jackson* would not support the Court's holding unless appellant asserted his right to counsel. If appellant did not assert his right to counsel or if his or his lawyer's actions indicate some type of waiver of any previous assertion of this right, then the Court would have to find some other basis to exclude appellant's voluntary confession. The Court's opinion decides appellant asserted his right to counsel "by accepting Ridley's appointment as his counsel" at appellant's arraignment on the burglary charge. This is not an unequivocal assertion of the right to counsel. *See Jackson*, 106 S.Ct. at 1406 (defendants explicitly requested appointment of counsel at their arraignment). At most, appellant's "accepting Ridley's appointment as his counsel" was an equivocal assertion of the right to counsel.

This cannot be considered an assertion of the right to counsel under

The other distinction between this case and *Jackson* is that after any assertion of appellant's right to counsel at arraignment the police twice received permission from appellant's lawyer to question appellant and the police questioned appellant on "numerous occasions" over a 17 month period without any objections from appellant or his lawyer. These actions by appellant and his lawyer amount to a type of waiver of any previous assertion of the right to counsel some 17 months before appellant confessed. Under these circumstances, it defies common sense to decide that a 17-month-old assertion of the right to counsel would still be effective.

Jackson, therefore, is neither "relevant" nor controlling.

It now becomes necessary to address this Court's federal constitutional decisions in *Holloway v. State*,[12] *Upton v. State*,[13] and *Frye v. State*.[14] Holloway clearly decided, as a matter of federal constitutional law, that a represented-by-counsel defendant cannot unilaterally make a valid waiver of his Sixth Amendment right to

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United States Supreme Court precedent decided after *Jackson*. *See Davis v. United States*, 512 U.S. 452, 114 S.Ct. 2350, 2356, 129 L.Ed.2d 362 (1994) (police interrogation need not cease in response to equivocal assertion of right to counsel); *Dowthitt v. State*, 931 S.W.2d 244, 257 (Tex.Cr.App.1996) (same rule with respect to equivocal assertions of right to remain silent). These rules apply in cases like this since they too are just an extension of the *Miranda v. Arizona/Edwards v. Arizona* line of cases. The Court, therefore, should analyze whether appellant asserted his right to counsel under these cases. The point is that something which *Jackson* might have considered an assertion of the right to counsel may not be so under these later cases that were decided after *Jackson*.

[12] *Holloway v. State*, 780 S.W.2d 787 (Tex.Cr.App.1989).

[13] *Upton v. State*, 853 S.W.2d 548 (Tex.Cr.App.1993).

[14] *Frye*, 897 S.W.2d at 327-29.

counsel during police- initiated interrogation on offenses to which the Sixth Amendment right to counsel has attached. *See Holloway*, 780 S.W.2d at 795-96. Under *Holloway*, it makes no difference whether this defendant previously has asserted his right to counsel.[15]

Holloway relied on various United States Supreme Court decisions none of which clearly support its holding. More important, *Holloway* did not address *Brewer*.[16] *Holloway* noted that

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[15] This Court originally affirmed the defendant's conviction in *Holloway*. *See Holloway*, 780 S.W.2d at 788. After granting the defendant's petition for certiorari, the United States Supreme Court remanded the case to this Court for reconsideration in light of *Jackson*. *See Holloway v. Texas*, 475 U.S. 1105, 106 S.Ct. 1508, 89 L.Ed.2d 908 (1986); *Holloway*, 780 S.W.2d at 788. On remand from the United States Supreme Court, this Court rejected the defendant's claim based on *Jackson* by deciding that the defendant never asserted his right to counsel. *See Holloway*, 780 S.W.2d at 790 (deciding that *Jackson* was inapplicable).

This Court, however, went on to reverse the case based on another soon to be discussed case the United States Supreme Court decided after *Jackson*. *See Holloway*, 780 S.W.2d at 794-96.

[16] For example, *Holloway* cited *Maine v. Moulton*, 474 U.S. 159, 106 S.Ct. 477, 88 L.Ed.2d 481 (1985). This is the case where a police agent secretly recorded conversations between the defendant and his lawyer. *See Moulton*, 106 S.Ct. at 487. *Moulton* and cases like it do not support Holloway's holding because in these cases "the nature of the police conduct was such that it would have been impossible to find a valid waiver of the defendant's Sixth Amendment right to counsel." *See Jackson*, 106 S.Ct. at 1414 (Rehnquist, J., dissenting).

Holloway also relied on United States Supreme Court jurisprudence on a capital defendant's Sixth Amendment right to counsel during psychiatric examinations on the future dangerousness punishment issue. *Holloway*, 780 S.W.2d at 795-96; *see Powell v. Texas*, 492 U.S. 680, 109 S.Ct. 3146, 3149-50, 106 L.Ed.2d 551 (1989) (formally charged capital

in *Patterson v. Illinois*,[17] which came after *Jackson*, the Supreme Court decided that an unrepresented- by-counsel defendant who had not previously asserted his right to counsel could unilaterally make a valid waiver of his Sixth Amendment right to counsel. *See Holloway*, 780 S.W.2d at 794-95.

Holloway's contrary holding for a represented-by-counsel defendant was based in part on footnote three of *Patterson* which says "a distinct set of constitutional safeguards aimed at preserving the sanctity of the attorney- client relationship takes effect" where an accused's Sixth Amendment right to counsel has attached and he is represented by counsel.[18] The Supreme Court has yet to decide what these "distinct set of constitutional safeguards" are.

Upton and *Frye* relied mainly on *Holloway* and the authorities upon which *Holloway* relied. *Upton* also noted a possible conflict between *Holloway* and *Brewer*. *See Upton*, 853 S.W.2d at 553 fn.

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defendant's Sixth Amendment right to counsel precludes psychiatric examination on future dangerousness without notice to counsel). In *Powell*, the defendant was neither warned of his rights during the psychiatric examination nor was his counsel notified of the psychiatric examination. *See Powell*, 109 S.Ct. at 3148. The Supreme Court decided that this violated the defendant's Sixth Amendment right to counsel. *See Powell*, 109 S.Ct. at 3150. Consistent with *Brewer*, however, part of the rationale for the Supreme Court's decision in Powell was that there was "no basis for concluding that [the defendant] waived his Sixth Amendment right." *See id. Powell* did not decide whether the defendant could have unilaterally waived this right. The *Powell* line of cases, therefore, do not clearly support *Holloway's* holding.

[17] *Patterson v. Illinois*, 487 U.S. 285, 108 S.Ct. 2389, 101 L.Ed.2d 261 (1988).

[18] *See Patterson*, 108 S.Ct. at 2393 fn. 3; *Holloway*, 780 S.W.2d at 795.

2. For these reasons, I would decline to follow *Holloway*, *Upton* and *Frye*.

With this in mind, it is clear that *Brewer* and *Jackson* conflict on whether a represented-by-counsel defendant can unilaterally make a valid waiver of his Sixth Amendment right to counsel when that defendant previously has asserted his Sixth Amendment right to counsel. *Brewer* says he can. *Jackson* says he cannot. *Patterson* further muddies the waters when it says that in cases like this a "distinct set of constitutional safeguards" exists without saying what these safeguards are. The law is not as "settled and familiar" as the Court's opinion says.[19] There needs to be some clarification on the "waiver" issue and on what "distinct set of constitutional safeguards" exists in cases like this.

Until this happens, I would decide consistent with *Brewer* and a proper balancing of the competing interests that a defendant can unilaterally make a valid waiver of his Sixth Amendment right to counsel in cases like this even when this defendant previously has asserted his right to counsel or, as the Court's opinion says, has "accepted" appointment of counsel. There is enough ambiguity and conflict in existing United States Supreme Court case law for this Court to give the benefit of the doubt to the law-abiding citizens of this state and decide that appellant's voluntary confession should be admitted into evidence. This is especially true since we are only dealing with alleged violations of prophylactic rules and not violations of constitutional rights. To the extent Jackson's prophylactic rule would require a contrary result, I would decline to follow it. *See Dickerson*, 166 F.3d at 672.[20]

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[19] *See Jackson*, 106 S.Ct. at 1414 (Rehnquist, J., dissenting) ("Court lacks a coherent, analytically sound basis for its decision" in cases like this).

[20] I also disagree with the Court's *McNeil v. Wisconsin* analysis. *See McNeil*, 111 S.Ct. at 2207. I would decide that appellant's Sixth

III. HARM

I also would decide that admission of appellant's voluntary confession was harmless. Any error in the admission of appellant's voluntary confession was rendered harmless by the admission of appellant's confession to his father that he murdered the victims. *See Leday v. State*, 983 S.W.2d 713, 717 (Tex.Cr.App.1998). The evidence further shows appellant burglarized the victims' home at the time of their disappearances. The jury would have used this evidence and the other evidence presented by the prosecution to convict appellant with or without his voluntary confession.

IV. TAINTED "FRUIT"

Finally, it should be noted that any "fruits" of appellant's voluntary confession are admissible. This is because the Court decides that appellant's voluntary confession was obtained in violation of only a prophylactic rule meant to safeguard Sixth Amendment rights. *See Jackson*, 106 S.Ct. at 1411; *Baker*, 956 S.W.2d at 23-24. The "fruits" of voluntary confessions obtained in violation of prophylactic rules are admissible. *See id.* And, I do not understand the Court's opinion to decide that the prosecution is

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Amendment right to counsel on the capital murder offense had not attached when appellant confessed to this offense. *See McNeil*, 111 S.Ct. at 2207 (Sixth Amendment right to counsel is offense-specific). The facts of this case are much different than the facts of *Upton* and do not fall within *Upton*'s "exception" to a "strict application" of *McNeil*. *See Upton*, 853 S.W.2d at 554-56. In *Upton* the defendant confessed to the capital offense after having been in custody for approximately two weeks after he committed the offense. *See id.*

In this case, appellant confessed approximately 17 months after he committed the offense during which time he was on the streets. The potential for police abuse identified in *Upton* does not exist here. *See id.*

precluded from making this claim on remand since the prosecution has had no reason to raise it earlier.

I respectfully dissent.

APPENDIX B

[Excerpt from Suppression Hearing Testimony of Hal R. Ridley]

[R 3:449-469]

Hal R. Ridley

having been first duly cautioned and solemnly sworn to tell the truth, the whole truth, and nothing but the truth was examined and testified as follows:

DIRECT EXAMINATION

BY MR. GREEN:

Q State your name for the record, sir?
A Hal Ridley.
Q You do understand that you are under oath for these proceedings?
A Yes, I do.
Q How are you employed, Mr. Ridley?
A I'm a lawyer in private practice in Huntsville.
Q How long have you been—Are you licensed by the State Bar of Texas?
A Yes, I am.
Q I assume you're current on your bar dues and have paid your occupational tax?
A Yes, I have.
Q Now, you represent Raymond Levi Cobb in these proceedings?
A And have since—yes.
Q Now, when did you first become involved in representing Raymond Levi Cobb as his lawyer?
A Back in August of 1994, and I think it was the 28th was when I received the official appointment letter.

THE COURT: Just a moment.

BY MR. GREEN:

Q Were you appointed by the Court to represent Mr. Cobb in August of 1994?

A That's correct.

Q And in what capacity?

A Mr. Cobb had pending, I believe, at that time a burglary of habitation case and he may have had a drug case by that time, also. It was for a possession of marijuana, I believe, and both of them were felonies. Delivery of marijuana, I'm sorry.

THE COURT: And you were appointed on that case as well?

THE WITNESS: Right. I had been approached by Mr. Weeks . . .

MR. GREEN: Your Honor, I would like to object to the District Attorney prompting this witness and attempting to rehabilitate his testimony.

THE COURT: So noted.

BY MR. GREEN:

Q Please try to just directly answer my questions.

THE COURT: Would you like to take this witness as an adverse witness?

MR. GREEN: I already thought I had.

BY MR. GREEN:

Q So you were duly appointed by this Court, the 12th Judicial District, to represent Raymond Levi Cobb on burglary charges.

A Right, and delivery of marijuana.

Q Both of these being felony offenses?

A Yes, sir.

Q Now, were you aware—was there anything—Well, just tell what was unusual about your representation on the burglary charge?

A Well, I had been approached by Mr. Weeks concerning this case, and he had indicated that—Mr. Cobb, he indicated, was not a suspect at that time in the slayings of the missing girl and her mom, but he did indicate that he thought he knew something about it. And I remember questioning him about it because we were coming off the trial of another capital murder case that had taken some time out of county and I really didn't want to get involved in another one right behind that, if Mr. Cobb was in fact the suspect.

Q By Mr. Weeks I assume you mean the Criminal District Attorney of Walker County, David P. Weeks?

A That's correct.

Q And when. . .

THE COURT: Are you sure this was August of '94? Is that when it was?

MR. GREEN: My understanding, Your Honor, is he was appointed August 15th.

THE COURT: It would have been at least that far back.

MR. GREEN: We've got the appointment in the file.

THE COURT: Off the record.

MR. RIDLEY: I'm sure it's August 28, 1994.

MR. WEEKS: Hal's right. I think he is right.

MR. GREEN: I have the appointment order here somewhere, Your Honor.

MR. WEEKS: He made this confession on the

burglary the 15th of July '94 so that would have been right. Mr. Ridley's memory is still working.

BY MR. GREEN:

Q To the best of your recollection you were appointed to represent him on the indictment concerning the burglary of the Owings residence approximately August 15th or thereabouts, 1994?

A That's correct.

Q And you testified that at this time you were made aware that there was that also—that this burglary was also connected to the disappearance of the—of Margaret Owings and her infant daughter, Kori?

A That's correct, and I was given the name of a possible suspect.

Q Not Raymond Cobb?

A Not Raymond Cobb.

Q Any you ascertained this information from a direct conversation with the District Attorney?

A And then subsequently reviewing the burglary file.

Q During the course of your representation of Mr. Cobb from August of 1994 until November 1995 did you have an occasion to make contact with law enforcement personnel who were investigating the disappearance of Margaret and Kori Owings?

A Yes.

Q Can you tell us the occasion?

A In fact it was—on each and every occasion it was in conjunction with me trying to negotiate a plea bargain arrangement, to be quite frank about it, on the burglary case. It was determined—or I was led to believe that the delivery case would be dismissed and we would be allowed to plead to a probation or deferred adjudication sentence on the burglary situation pending a little more investigation of the

missing Owings people.

What had happened was—And I was first contacted when Mr. Cobb showed up in Odessa at a docket call by Judy James or someone with—I think it was—I take it back. It was Steve Haas was who it was, and though Mr. Weeks indicated that they wanted to question Cobb about the case. And I, of course, told them to go right ahead.

Q You don't mean the burglary case?

A No, I'm talking about the missing people, the missing persons problem. And I did give my consent at that time and told them. . .

Q What time was this?

A When was this?

Q Yes.

A This was shortly after I was appointed because there was a docket call in the normal course of things. He came down for an arraignment is what is was. Whenever the docket call shows that he was arraigned would have been the time that they asked the first time permission to talk to him. I gave my permission and told them that it wasn't necessary for me to be there. And they discussed it with him and he—you know. We talked briefly. That's when his dad came with him, I believe, and they talked to me in my office. And at that time we never did make a deal. They decided, you know,—but he was talked to and released so I didn't think anything more of it.

The next time—I had gone ahead—The case was getting pretty old, and Raymond had showed up with his girlfriend and a friend who had driven them from Odessa unbeknownst to me. And so I contacted Mr. Weeks in an effort to try to work out a settlement of the burglary case since they had in fact come down from Odessa for purposes of the court date, and we came pretty close to doing it.

And then Mr. Weeks contacted, I believe, either

Sheriff Myers or someone else—and it may have Judy James—and indicated that Ranger Haley and Judy James did want to interrogate Raymond at that time. Again I gave my permission for them to interrogate him. And I know for a fact that he was with them for over three hours, and that was with Haley and James.

Q And you were in the courtroom when Lieutenant Haley, Ranger Haley testified that this occurred on September 13, 1995?

A That's quite—That's very accurate. I think that's right. I was thinking it was late ~~A~~august, but September would be accurate. I didn't hear him testify to that. I came in late, but I would not dispute that.

Q So prior to November, 1995, every time the law enforcement officials and/or members of the District Attorney's Office decided they needed to talk to your client, Raymond Cobb, concerning the disappearance of Margaret and Kori Owings they always contacted you and asked you for your permission?

A I would say yes because Mr. Cobb never called me and indicated otherwise, and on each occasion I gave my permission believing he wasn't a suspect.

Q Because you were led to believe all along that he was not a suspect?

A Well, we came very close in September to reaching an agreement, and then that's when David decided that he needed to talk with the people one more time. In fact that's what he said. "Let me call and if they don't need to see him any more, we will do a deal today."

Q You have heard the testimony the last two days from Detective Judy James and Detective Debbie Funk—or actually you did not hear Debbie Funk's testimony, but they indicated that Cobb was always a suspect in this case.

A Well, I had gone out to the jail on another matter later.

After Haley and James spent about three hours with him that day I went out to the jail, probably the next week, to see some other people and got in a conversation with Sheriff Meyers. And Sheriff Meyers at that time personally told me that he thought Cobb was a suspect all along. He flat told me he thought Cobb was guilty; he just couldn't prove it. And that was the first time I was aware. . .

Q What date is. . .

A This would have been about a week after Haley and James talked to him. It was that same month. This was prior to the news breaking, though, that he had given a statement.

Q This was after Haley and James' contact with him with your permission on September 13, 1995, approximately a week later?

A Right.

Q But prior to that no law enforcement personnel had ever informed you that Cobb was a suspect?

A They always said they thought he knew more than he was saying, but in fact, I still had no reason to believe the person I was originally informed was the suspect wasn't still the suspect.

Q This was a different party?

A Yes.

Q And who was this person?

A Tim Root, R-o-o-t. It's Raymond's sister's—I guess they may be married now. I know they have a child. They were boyfriend and girlfriend anyway.

Q At the time of the disappearance of Maggie Owings, Raymond Cobb's sister was dating or involved with Tim Root?

A That's correct.

Q And you were told that he was a suspect?

A That's correct.

Q And you were told that he was the main suspect?

A I was just told he was a suspect.
Q But other than your conversation with Dale Meyers a week after the September 13th meeting between—or interview and investigation involving Ranger Haley and Judy James you were not informed that he was a suspect?
A No.
Q All right. I want to take you to November 11th of 1995. You have heard all the testimony in here today, obviously, as Raymond Cobb's lawyer in this case. Did any person from the District Attorney's Office, Texas Rangers, Department of Public Safety, Walker County Sheriffs Office, or any other law enforcement agency contact you on the evening of November 11th concerning their desire to get Raymond Cobb to talk to his father?
A No.
Q Were you told at that time that any new heated investigation was going on concerning Raymond Cobb's involvement in the disappearance of Owings?
A No.
Q Were you informed in the early morning hours of November 12th that there was a warrant issued for Raymond Cobb's arrest charging him with capital murder?
A No, I was not.
Q Were you informed in the early morning hours of November 12, 1995, that Raymond Cobb has been taken into custody by Detectives Thomas and Sikes of the Odessa Police Department?
A No.
Q Were you informed that Raymond Cobb would be transported—was being transported between 9:00 and noon from Odessa to the Huntsville Memorial—or Huntsville International Airport?
A No, I wasn't.
Q I should say Huntsville Municipal Airport. When was the

first time you were informed that Raymond Cobb was under arrest, being interrogated, being asked to lead them on a search concerning the disappearance of the Owings?
A I don't believe I was ever told they were going—the fact of the search was sometime later. Mr. Weeks called me at my home, and I want to say it was Sunday evening, and informed me that Cobb had been—had given a statement implicating himself; that he was going to be brought back and—or that he had already been brought back, I guess it was, and that. . .
Q Sunday evening would have been the 13th, would it not?
A Right.

THE COURT: The 12th.

A Okay. I was sitting at home, and I remember—Well, I remember that it was Sunday because the next day I believe in the Item there was a big story about it, and it was the same day that Tim Freeman was murdered by Luis Lagaite. And I was Tim Freeman's lawyer, and I remember how odd it was that I had a client supposedly confess to capital murder and a client be a victim of a capital murder all in the one weekend. It wasn't a good weekend needless to say, but it was the same weekend as that murder. So like I said, Mr. Weeks had called me about that also so he was just full of good news that evening. But he did contact me at home and let me know what transpired with Raymond.
Q Do you have any idea what time this was Sunday evening?
A It was, you know, 8:00; 9:00 o'clock, somewhere in the later part of the evening. It was dark; I remember that.
Q This is the evening of the 12th, Sunday evening?
A Yes, sir.
Q Okay. And prior to this no one had contacted you?
A Certainly no one had contacted you while Raymond Cobb

was being interviewed in the early morning hours of the 12th?

A No.

Q In Odessa by Sergeant Thomas and Corporal Sikes?

A No.

Q And when was your next contact concerning—When is the next time anyone contacted you after Mr. Weeks contacted you on the evening of the12th?

A Well, I went out and saw Raymond in the jail I'm going on to say the very next—well, Monday and tried to find out what was going on and got his story. And I believe I talked with Haley and James a little bit. In fact Judy asked me if I was going to be representing him. I told her I didn't know. I was his lawyer for the burglary case; that you know, that decision hadn't been made to my knowledge yet, but we talked a little bit. And I met with Raymond and kind of went over, you know, what had transpired and eventually got a copy of his initial statement, the one that's in evidence now, kind of went over that with him somewhat.

Q All right.

A And then I was contacted the next evening, and I thought—it may have been James that called me, but I thought it was David Weeks that asked me if Raymond could go out there and. . .

Q Again?

A Yeah. This would have been the next night, and asked if Raymond could go out there or if I had any objections to him going out there with Haley and James. And then he left me—I think he left me the number to call James directly and contact her. I think that's how that went because for some reason I almost want to swear that I was—I had talked to him first about it. And I told him, "Well, you know, I don't know what else he could tell you," but I did not deny

them permission to take him out there.

And then I remember the next time—I was called again that next night by David and said I needed to get out to the jail because Raymond was having some problems and was having some—apparently some emotional problems. And I know that was the 14th because that's the day his son was born.

And so he—And I went out there. And eventually I saw Judy out there, and she arranged for a phone call between he and his girlfriend so that he could talk to her and it seemed to help the situation some, and that was kind of the sequence of events. And ultimately I was appointed to represent him, and after that I pretty much—well, after that I pretty much cut off any more contact that he had with law enforcement at that point in time.

Q To the best of your knowledge he has not had any further contact?

A Shouldn't have had after the 14th. If he did, it was without my permission.

Q Is there anything else you would like to add, Mr. Ridley, that I may have failed to ask you?

A No. I think that's kind of a sequence of events from when I initially got involved. I don't know when my official appointment was here, but I know I talked with Judge McAdams about it; talked with Mr. Weeks about it, and I wanted to talk to you about it, also, to see if you would be interested in being involved.

Q And as his lawyer you understand that you represented him prior on the burglary charge, and these capital murder charges also stem from the same transactional basis as the burglary that you were appointed to represent him on?

A I understand that very well, yes.

Q For the record, we're not talking about two completely separate incidents here?

A No, this is exactly the same incident.

MR. GREEN: Pass the witness.

CROSS EXAMINATION

BY MR. WEEKS:

Q Mr. Ridley, as I recall on the night of Sunday the 12th I, David Weeks, contacted you at home that night?

A That's correct.

Q And you were informed at that time of the confession and the arrest. Would your response—Was your response at that time that "I represent him on the burglary, not on the capital murder?"

A I'm not going to deny that I said that because I think I said that more than once. Because I specifically told Judy James I wasn't sure that I was going to be involved on the capital murder case as late as two days later.

Q I think we had a discussion about that considering the circumstances that I wanted you to know about it?

A That's correct.

Q And that probably until such time as we could get somebody appointed it would probably be good for you to help him out?

A You did say that. You indicated that I should go see him, yes.

Q And your appointment on the capital murder came sometime later?

A Yes.

Q The calls that were made to you concerning Raymond Cobb's contact with law enforcement. . .

THE COURT: I'm sorry, David, just a second. The first time you were contacted during the final round—in other words,

from Odessa to when it all stopped was when they wanted to the take him out there the last time?

THE WITNESS: The time that Detective Haley—when he was talking about the incident with the baby. That was the time they asked, you know, to take him out there.

BY MR. WEEKS:

Q The first time you were contacted was the night following his return from Odessa, that very night?

A Right.

Q Were those contacts and the contact to you on Sunday night, would you consider those courtesy contacts?

A Well, I mean that's kind of hard to say. I felt like you were trying to let me know that, you know, a client that I had was, you know—I felt it was a little more than a courtesy. I thought that—I think, yes, it was a courtesy, but I mean I think I would have thought that you were concerned about, you know, him being represented and things of that nature. I have never know you to not want somebody to have a lawyer when they were in trouble. But, yes, I would say it was a matter of courtesy and information since I was kind of the—You know, things had taken—I would say probably an understatement—a drastic turn of events.

Q And as far as there had been a confession to the burglary case?

A You didn't hide anything from me. You pretty much told what had all gone on.

Q Okay. Thank you, Mr. Ridley.

MR. WEEKS: Pass the witness.

REDIRECT EXAMINATION

BY MR. GREEN:

Q Mr. Ridley, if you had been contacted by David Weeks or Judy James at 2:39 in the morning and informed by them that your client, Raymond Cobb, was under arrest for capital murder based on an oral statement he gave his father, would you have allowed law enforcement personnel to interview Raymond Cobb?

A Not in a million years.

Q Would you repeat that?

A Not in a million years. I would have been on the phone to Judge McAdams finding out what we could do about it, but I would not under any circumstances have allowed it.

Q Would you have allowed him to consent to a search of his residence?

A Consent—I would have told him not to say anything, or do anything, or sign anything.

Q Would you have demanded immediate access to your client, at least telephonically?

A Yes, because I would have wanted to speak to him directly.

MR. GREEN: No further questions.

RECROSS EXAMINATION

BY MR. WEEKS:

Q Of course, your client's right to counsel is his privilege to invoke, is it not?

A I would agree with that.

Q Thank you.

MR. WEEKS: Pass the witness.

MR. GREEN: Nothing further. The defendant has no further witnesses, Your Honor, or evidence to present at this hearing.

APPENDIX C

[Excerpt from trial proceedings held on February 19, 1997]

[R 17:15-16]

THE COURT:

Mr. Cobb, would you please stand, sir? Mr. Weeks, you may present the indictment.

MR. WEEKS:

In the name and by the authority of the State of Texas the Grand Jury in and for the County of Walker, State of Texas, duly selected, impaneled, sworn, charged, and organized as such at the July term A.D. 1995, of the District Court for said county upon their oath present in and to said Court at said term that Raymond Levi Cobb, defendant, on or about the 27th day of December A.D. 1993, and before the presentment of this indictment in the county and state aforesaid did then and there intentionally and knowingly cause the death of an individual, namely Margaret Owings, by stabbing her with a knife and by manner and means unknown to the Grand Jury, and did then and there intentionally and knowingly cause the death of another individual, namely Kori Rae Owings, by suffocation and by manner and means unknown to the Grand Jury, and both murders were committed during the same criminal transaction. Against the peace and dignity of the State. Signed by J.T. Langely, Foreman of the Grand Jury.

THE COURT:

Thank you, Mr. Weeks. Mr. Cobb, what is your plea, sir?

MR. RIDLEY:

Judge, on advice of counsel Mr. Cobb stands mute.

THE COURT:

Then will you enter the plea for him?

MR. RIDLEY:

The Court can take notice — How we will proceed, I assume, is — I guess the Court will enter a plea of not guilty for him.

THE COURT:

If that's your request then, yes, sir, I will. Thank you, and at this time, Mr. Weeks, you may give an opening statement.

MR. WEEKS:

Thank you, Your Honor.

APPENDIX D

[Findings of Fact and Conclusions of Law filed October 29, 1997]

[Supp. R 1:1-4]

CAPTION

THE STATE OF TEXAS
COUNTY OF WALKER

At a regular term of the 12th Judicial District Court begun and holden within and for the County of Walker, and the State of Texas, before the Honorable William L. McAdams Judge, thereof presiding, which term began on the 1st day of January, 1997, and which term adjourned on the 30th day of June, 1997, the following cause came on for hearing, to wit:

THE STATE OF TEXAS NO. 18,920

VS

RAYMOND LEVI COBB

CHARGE: CAPITAL MURDER

WILLIAM L. MCADAMS

Presiding Judge

12TH Judicial District Court

Walker County, Texas

NO. 18,920

RAYMOND LEVI COBB, § IN THE DISTRICT COURT OF'
Appellant

VS. § WALKER COUNTY, T E X A S

STATE OF TEXAS § 12TH JUDICIAL DISTRICT
Appellee

FINDINGS OF FACT AND CONCLUSIONS OF LAW

On the 18th day of December, 1996, this Court entered an Order denying defendant Raymond Levi Cobb's motions to suppress evidence in the above styled and numbered cause of action, and the attorneys for the defendant have requested the Court enter findings of fact and conclusions of law in support of the Court Order denying the defendant's motions to suppress State's evidence in this cause, accordingly, the Court makes the following findings of fact and conclusions of law.

1. Raymond Levi Cobb's November 11, 1995, oral confession to Charles Cobb that he had killed Margaret Owings and that Kori Rae Owings was dead was not a result of custodial interrogation.

2. On November 11, 1995, Charles Cobb was not acting as an agent of any law enforcement agencies when he confronted Raymond Levi Cobb about the disappearance of Margaret Owings and Kori Rae Owings.

3. Raymond Levi Cobb signed a written consent to search on November 12, 1995, and allowed Detective Vic Sikes and

Sergeant Harold Thomas to search his Odessa apartment.

4. Raymond Levi Cobb knowingly and intelligently signed a written consent to search on November 12, 1995, and voluntarily allowed Detective Vic Sikes and Sergeant Harold Thomas to search his Odessa apartment.

5. The wedding band of Margaret Owings recovered by Detective Vic Sikes and Sergeant Harold Thomas from Raymond Levi Cobb's Odessa apartment was voluntarily given to Sergeant Harold Thomas by Raymond Levi Cobb and was not a result of a search.

6. Knives recovered by Charles Cobb from Raymond Levi Cobb's Odessa apartment were not the result of a search and Charles Cobb had permission to be in the apartment and Charles Cobb was not acting as an agent for any law enforcement agencies.

7. The evidentiary search warrant issued by Judge Bill McCoy of the 358th District Court of Ector County was valid and the evidence resulting from the search of Raymond Levi Cobb's Odessa apartment on November 13, 1995, by Detective Vic Sikes and Sergeant Harold Thomas was properly obtained and admissible.

8. Raymond Levi Cobb was read his Miranda warnings by Odessa Police officers Vic Sikes and Harold Thomas, and was magistrated at the Jail in Odessa on November 12, 1995, and was magistrated in Walker County by Judge John Pasket on that same day. Raymond Levi Cobb acknowledged that he understood those rights, waived those rights and voluntarily took officers to the area where the remains of Margaret Owings and the clothing of Kori Rae Owings were found. Raymond Levi Cobb never invoked his right to counsel at any time.

9. Attorney Hal Ridley was appointed by the District Court of Walker County to represent Appellant for a burglary in Cause No. 18,260 that occurred in Walker County on or about December 26, 1993, with such appointment occurring on August 15, 1994;

10. The burglary in question for which Appellant was indicted by the Walker County grand jury was the same matter for which Appellant was subsequently indicted by the Walker County grand jury in the second paragraph of the indictment for the offense of capital murder, the burglary for which Appellant was being represented by Attorney Ridley from August, 1994;

11. This Court finds, however, that under the facts and circumstances of this case, the written confession taken from the Appellant was given voluntarily, and was admissible in this trial against the Appellant under the provisions of Article 38.22, Texas Code of Criminal Procedure and all other relevant state and federal case law and statutes, and the Texas and U.S. Constitutions.

12. The burglary charged against Appellant, for which Attorney Ridley had been appointed, was still pending and had not been disposed of by the date that the subsequent written confession was given by appellant on November 12, 1995, and thus, Attorney Ridley was still counsel of record for Appellant on this burglary charge on November 12, 1995.

13. Raymond Cobb was tried for Capital Murder as alleged in the first paragraph of the indictment for the murders of Margaret Owings and Kori Rae Owings during the same transaction, and not the second paragraph of the indictment which was abandoned before trial.

14. Appellant had been a suspect in this burglary in late December, 1993, as the appellant had been interrogated by police officers in Walker County and had given a written statement to officers at that time, and furthermore, Appellant gave a written confession on July 15, 1994 to Walker County law officers, admitting that he committed this burglary.

15. Attorney Ridley testified that, as a result of assurances by Walker County law enforcement officers that Appellant was not a suspect in the missing persons case involved herein, he allowed Appellant to discuss this case with officers, without his presence, since he relied upon the representations of the law enforcement officers that Appellant was not a suspect in this capital murder case. Mr. Ridley never informed law enforcement not to talk to Raymond Cobb without his presence.

16. Mr. Ridley testified that, at all times, he was under the impression that another person was the true suspect for this missing person/murder case, that person being one Tim Root, and Mr. Ridley relied on these representations by law enforcement.

17. It was not until late September, 1995, that counsel Ridley was informed by Sheriff Myers that Appellant was a suspect in the disappearance, and at that time, Appellant was residing in Odessa, Texas, after he had been released on bond from the previous burglary charge.

18. Mr. Ridley testified that when law enforcement officers arrested Appellant, in Odessa, Texas, on the morning of November 12, 1995, he was not notified of that arrest, nor was he ever notified that Appellant was being brought back to Walker County for further interrogation until after Appellant had given his written confession and had led officers to the bodies of the deceased, providing oral confessions that became admissible during

the trial, under Article 38.22, Sec. 3(c), V.A.C.C.P.;

19. Attorney Ridley testified that he had previously informed Appellant that should any law enforcement officers question him, without notifying counsel in advance, that he should inform them to contact him, as he was counsel of record, and Mr. Ridley further indicated that he gave this advice to both Appellant and to Appellant's father in June, 1995, prior to the taking of this confession in this case.

20. Raymond Levi Cobb did not request an attorney at any time before, during, or after the November 12, 1995, interviews with Detective Vic Sikes and Sergeant Harold Thomas of the Odessa Police Department.

21. Mr. Ridley testified "had he known that Appellant was under arrest for Capital Murder he would not have allowed law enforcement personnel to interview Appellant in a million years", and had he been informed as to Appellant's arrest, he would not have allowed Appellant to talk to the officers about the murder case;

22. This Court finds that is undisputed that Attorney Ridley was not contacted by Walker County law enforcement when Appellant was brought back to Huntsville from Odessa, and was not notified about the confessions given by Appellant until the 12th of November 1995, during the late afternoon or evening hours;

23. Hal Ridley was appointed in August, 1994, to represent Raymond Levi Cobb on indictments charging Raymond Levi Cobb with Delivery of Marihuana and Burglary of a Habitation. Hal Ridley testified he was not Raymond Levi Cobb's attorney on the Capital Murder of Margaret Owings and Kori Rae Owings on November 11, 12, and 13, 1995.

24. The police officers in Odessa, Texas did not know that Appellant was represented by counsel Ridley in this previous burglary case, and there is no evidence to show that the Walker County Justice of the Peace Pasket, who gave Appellant his Miranda warnings on November 12, 1995 at 9:19 a.m., had been informed that attorney Ridley had been representing Appellant on this burglary case from 1993.

25. Raymond Levi Cobb was arrested on a complaint for Capital Murder alleging he killed Margaret Owings and Kori Rae Owings during the same transaction. Raymond Cobb's written confession taken by investigator, Vic Sikes and all of the evidence obtained after the confession were not in violation of Upton v. State, 853 S.W. 2nd 554 (Tex.Cr.App.1993)

These Findings of Fact and Conclusions of Law entered on this the 28th day of October, 1997.

/s/ Williams McAdams
Judge, William McAdams

APPENDIX E

[Charge of the Court filed February 25, 1997]

[TR 1:145-152]

CAUSE NO. 18,920

THE STATE OF TEXAS	§ IN THE DISTRICT COURT
VS.	§ WALKER COUNTY, T E X A S
RAYMOND LEVI COBB	§ 12TH JUDICIAL DISTRICT

CHARGE OF THE COURT

LADIES AND GENTLEMEN OF THE JURY:

The defendant, Raymond Levi Cobb, stands charged by indictment with the offense of capital murder, alleged to have been committed in Walker County, Texas on or about the 27th day of December, A.D. 1993. To this charge the defendant stood mute on advice of counsel and therefore the Court has entered a plea of not guilty on his behalf.

You are instructed that you will consider only the guilt or innocence of the defendant from the evidence admitted before you and from the law as given to you in this charge by the Court. You are instructed that the law applicable to this case is as follows:

1.

Our law provides that a person commits the offense of murder if he intentionally or knowingly causes the death of an individual.

A person commits the offense of capital murder if he commits murder as defined above and he murders more than one

person during the same criminal transaction.

2.

A person acts intentionally, or with intent, with respect to the nature of his conduct or to a result of his conduct when it is his conscious objective or desire to engage in the conduct or cause the result.

A person acts knowingly, or with knowledge, with respect to the nature of his conduct or to circumstances surrounding his conduct when he is aware of the nature of his conduct or that the circumstances exist. A person acts knowingly, or with knowledge, with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result.

"Individual" means a human being who has been born and is alive.

"Sudden passion" means passion directly caused by and arising out of provocation by the individual killed or another acting with the person killed, which passion arises at the time of the alleged offense and is not solely the result of former provocation.

"Adequate cause" means cause that would commonly produce a degree of anger, rage, resentment, or terror in a person of ordinary temper, sufficient to render the mind incapable of cool reflection.

3.

Now, bearing in mind the foregoing instructions, if you find from the evidence beyond a reasonable doubt that on or about the 27th day of December 1993, in Walker County, Texas, as alleged in the indictment, the defendant, Raymond Levi Cobb, did then and there intentionally murder more than one person during the same criminal transaction, to-wit: that the said Raymond Levi Cobb did then and there intentionally or knowingly cause the death of an individual, namely, Margaret Owings, by stabbing her with a knife, or by manner and means unknown to the grand jury, and the defendant, Raymond Levi Cobb, in so acting was not acting under the immediate influence of sudden passion arising from an adequate

cause, and that the said Raymond Levi Cobb did then and there intentionally or knowingly cause the death of an individual, namely, Kori Rae Owings, by suffocation, or by manner and means unknown to the grand jury, and the defendant, Raymond Levi Cobb, in so acting was not acting under the immediate influence of sudden passion arising from an adequate cause, then you will find the defendant guilty of capital murder and so say by your verdict.

Unless you so find beyond a reasonable doubt, or if you have a reasonable doubt thereof, you will acquit the defendant of capital murder and next consider whether he is guilty of murder.

4.

If you find from the evidence beyond a reasonable doubt that on or about the 27th day of December, 1993, in Walker County, Texas the defendant, Raymond Levi Cobb, did intentionally or knowingly cause the death of an individual, namely; Margaret Owings, by stabbing her with a knife or by manner and means unknown to the grand jury, but you do not believe beyond a reasonable doubt that the defendant did intentionally or knowingly cause the death of Kori Rae Owings by suffocation or by manner and means unknown to the grand jury, then you will find the defendant guilty of the murder of Margaret Owings.

Unless you so find beyond a reasonable doubt or you have a reasonable doubt thereof you will acquit the defendant of the murder of Margaret Owings and next consider whether he is guilty of the murder of Kori Rae Owings.

5.

Now, if you find from the evidence beyond a reasonable doubt that on or about the 27th day of December, 1993, in Walker County, Texas, the defendant, Raymond Levi Cobb, did intentionally or knowingly cause the death of an individual, namely Kori Rae Owings, by suffocation or by manner and means unknown to the grand jury, but you do not believe beyond a reasonable doubt that the defendant did intentionally or knowingly cause the death of

Margaret Owings by stabbing her with a knife or by manner and means unknown to the grand jury, then you will find the defendant guilty of the murder of Kori Rae Owings.

Unless you so find beyond a reasonable doubt or you have a reasonable doubt thereof you will acquit the defendant of the murder of Kori Rae Owings.

6.

If you find from the evidence beyond a reasonable doubt that the defendant is guilty of either capital murder or the murder of either Margaret Owings or Kori Rae Owings, but you have a reasonable doubt as to which offense he is guilty, then you must resolve that doubt in defendant's favor and find him guilty of the lesser offense of murder of either Margaret Owings or Kori Rae Owing's, individually.

7.

Our law provides that a defendant may testify in his own behalf if he elects to do so. This, however, is a privilege accorded a defendant, and in the event he elects not to testify, that fact cannot be taken as a circumstance against him.

In this case, the Defendant has elected not to testify, and you are instructed that you cannot and must not refer or allude to that fact throughout your deliberations or take it into consideration for any purpose whatsoever as a circumstance against the Defendant.

8.

A grand jury indictment is the means whereby a Defendant is brought to trial in a felony case. It is not evidence of guilt nor can it be considered by you in passing upon the question of the guilt of the Defendant. The burden of proof in all criminal cases rests upon the State throughout the trial, and never shifts to the defendant.

All persons are presumed to be innocent and no person may be convicted of an offense unless each element of the offense is proved beyond a reasonable doubt. The fact that a person has been arrested, confined or indicted for, or otherwise charged with, the

offense gives rise to no inference of guilt at his trial. The law does not require a defendant to prove his innocence or produce any evidence at all. The presumption of innocence alone is sufficient to acquit the defendant, unless the jurors are satisfied beyond a reasonable doubt of the defendant's guilt after careful and impartial consideration of all the evidence in the case.

The prosecution has the burden of proving the defendant guilty and it must do so by proving each and every element of the offense charged beyond a reasonable doubt and if it fails to do so, you must acquit the defendant.

It is not required that the prosecution prove guilt beyond all possible doubt; it is required that the prosecution's proof excludes all "reasonable doubt" concerning the defendant's guilt.

A "reasonable doubt" is a doubt based on reason and common sense after a careful and impartial consideration of all the evidence in the case. It is a kind of doubt that would make a reasonable person hesitate to act in the most important of his or her own affairs.

Proof beyond a reasonable doubt, therefore, must be proof of such a convincing character that you would be willing to rely and act upon it without hesitation in the most important of your own affairs.

In the event you have a reasonable doubt as to the defendant's guilt after considering all the evidence before you, and these instructions, you will acquit him and say by your verdict "not guilty."

You are the exclusive judges of the facts proved, the credibility of the witnesses and the weight to be given their testimony, but the law you shall receive in these written instructions, and you must be governed thereby.

After you retire to the jury room, you should select one of your members as your Presiding Juror. It is his or her duty to preside at your deliberations, vote with you, and when you have unanimously agreed upon a verdict, to certify to your verdict by

using the appropriate form attached hereto, and signing the same as Presiding Juror.

No one has any authority to communicate with you except the officer who has you in charge. During your deliberations in this case, you must not consider, discuss, nor relate any matters not in evidence before you. You should not consider nor mention any personal knowledge or information you may have about any fact or person connected with this case which is not shown by the evidence.

Your verdict must be by a unanimous vote of all members of the jury. In arriving at your verdict, it will not be proper to fix the same by lot, chance, or any other method than by a full, fair and free exercise of the opinion of the individual jurors under the evidence admitted before you.

After you have retired, you may communicate with this Court in writing through the officer who has you in charge. Do not attempt to talk to the officer, the attorneys, or the Court concerning any question you may have. After you have reached a unanimous verdict, the Presiding Juror will certify thereto by using the appropriate form attached to this charge and signing his or her name as Presiding Juror. You may now retire to consider your verdict after argument of counsel.

/s/ William McAdams
William McAdams, Judge Presiding

Date: February 25, 1997

No. 18, 920

THE STATE OF TEXAS § IN THE DISTRICT COURT

VS. § WALKER COUNTY, T E X A S

RAYMOND LEVI COBB § 12TH JUDICIAL DISTRICT

VERDICT SHEET

We, the Jury, find the Defendant, Raymond Levi Cobb, guilty of the offense of Capital Murder as charged in the indictment.

/s/ Phillip Townsend
Presiding Juror

OR

We, the Jury find the defendant, Raymond Levi Cobb, guilty of the murder of Margaret Owings.

_____
Presiding Juror

OR

We the jury find the defendant, Raymond Levi Cobb, guilty of the murder of Kori Rae Owings.

_____
Presiding Juror

OR

We, the Jury, find the Defendant, Raymond Levi Cobb, not guilty.

_____
Presiding Juror

Date: February 25, 1997

APPENDIX F

[Judgment and Sentence on Plea of Not Guilty Jury Trial filed February 27, 1997]

[TR 1:158-162]

NO. 18, 920

THE STATE OF TEXAS	§	IN THE DISTRICT COURT OF
VS.	§	WALKER COUNTY, TEXAS
RAYMOND LEVI COBB	§	12TH JUDICIAL DISTRICT

JUDGMENT AND SENTENCE ON PLEA OF NOT GUILTY
JURY TRIAL

Judge Presiding: William McAdams

Date of Judgment: February 27, 1997

Attorney for State: David P. Weeks and John R. Gaines
Attorney for Defendant: Hal Ridley and Bruce Green

Offense Convicted of: Capital Murder
Date Offense Committed: December 27, 1993
Degree: Capital

Charging Instrument: Indictment
Plea: Not Guilty entered by the Court

Plea to Enhancement Paragraph(s) : n/a
Findings on Enhancement: n/a

Finding on Use of Deadly Weapon: n/a

Date Sentence Imposed: February 27, 1997
Costs: $

Punishment and Place of
Confinement: DEATH/TDCJ-ID
Date to Commence: 2/27/97 Time Credited:

Total Amount of Restitution/Reparation: N/A
Restitution to be paid to:
Name: N/A
Address:

Concurrent Unless Otherwise Specified.

THE STATE OF TEXAS VS. RAYMOND LEVI COBB
CAUSE NO. 18,920
PAGE 2

On the 19th day of February, 1997, this cause was called for trial, and the State appeared by her District Attorney, and the defendant, Raymond Levi Cobb, appeared in person in open court, his counsel, Hal Ridley and Bruce Green, also being present, and the said defendant having been duly arraigned, the defendant stood mute on advice of counsel and therefore the Court entered a plea of not guilty on his behalf to the charge contained in the indictment herein, both parties announced ready for trial, and thereupon a jury was selected and seated consisting of Phil Townsend (foreperson) and eleven others who were duly sworn. Thereupon the indictment was read and the court entered a plea of not guilty for the defendant to the following charge contained in the indictment and read to the jury by the State: Capital Murder.

All of the evidence was presented by both the State and the Defendant and the charge was read to the jury by the court and thereupon the jury heard the arguments of both sides and retired in charge of the proper officer to consider of their verdict and afterward were brought into open court by the proper officer, the defendant and counsel being present, and returned the following verdict which was received by the Court and is here now entered upon the minutes of the Court, to-wit:

We, the jury, find the defendant, Raymond Levi Cobb, guilty of the offense of capital murder, as alleged in the indictment.

/s/ Phillip Townsend
Foreperson of the Jury

THE STATE OF TEXAS VS. RAYMOND LEVI COBB
CAUSE NO. 18,920
PAGE 3

And on this the 26th day of February A.D. 1997, this cause being again called, the State appeared in person, his counsel also being present, and the same jury being called to assess the punishment, evidence was presented to the same jury in the matter of assessing punishment. The same jury after hearing all the evidence presented by the State and the defendant for the purpose of assessing punishment, and after having heard argument of counsel, again retired in charge of the proper officer to consider of the verdict, and afterward were again brought into court by the proper officer, the defendant and his counsel being present, and the jury returned into open court the following verdict, which was received by the Court and is here now entered upon the minutes of the Court, to-wit:

SPECIAL ISSUE NO. 1

Do you find from the evidence beyond a reasonable doubt there is a probability that the defendant, Raymond Levi Cobb, would commit criminal acts of violence that would constitute a continuing threat to society?

ANSWER TO SPECIAL ISSUE NO. 1

We, the Jury, unanimously find and determine beyond a reasonable doubt that the answer to this Special Issue is "Yes."

/s/ Phillip Townsend
Presiding Juror

SPECIAL ISSUE NO. 2

Do you find from the evidence, taking into consideration all the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, that there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed?

ANSWER TO SPECIAL ISSUE NO. 2

We, the Jury, unanimously find that the answer to this Special Issue is "No."

/s/ Phillip Townsend
Presiding Juror

We, the Jury, having answered the foregoing issues, return the same into court as our verdict.

/s/ Phillip Townsend
Presiding Juror

It is therefore CONSIDERED and ADJUDGED by the Court that the defendant, Raymond Levi Cobb, is guilty of the offense of Capital Murder as found by the jury, and the jury having further answered

We, the Jury, unanimously find and determine beyond a reasonable doubt that the answer to this Special Issue is "Yes."

We, the Jury, unanimously find that the answer to this Special Issue is "No"; and the law providing that on such jury finding the Court shall assess the death penalty to the defendant.

It is, therefore, the Order of the Court that the defendant be punished by having the death penalty assessed against him.

Thereupon the Defendant, Raymond Levi Cobb, was asked by the Court whether he had anything to say why said sentence should not be pronounced against him and he answered nothing in bar thereof, whereupon the Court proceeded, in the presence of said Defendant, Raymond Levi Cobb, to pronounce sentence against him as follows:

Whereas, the Defendant has been adjudged to be guilty of capital murder by the jury and the jury having further answered

We, the Jury, unanimously find and determine beyond a reasonable doubt that the answer to this Special Issue is "Yes."

We, the Jury, unanimously find that the answer to this Special Issue is "No;" and the law providing that on such jury finding the Court shall sentence the Defendant to death.

It is, therefore, the ORDER of the Court that the Defendant is sentenced to death; but the law further providing for an automatic appeal to the Court of Criminal Appeals of the State of Texas, the sentence is suspended until the decision of the court of Criminal Appeals has been received by this Court.

The Defendant is now remanded to the custody of the Sheriff of Walker County, Texas, to be transported to the Institutional Division of the Texas Department of Criminal Justice at Huntsville, Texas, there to await the action of the Court of Criminal Appeals and the further orders of this Court.

Entered this the 27th day of February, A.D. 1997.

/s/ William McAdams
JUDGE PRESIDING